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# CHAIN GANGS, BOOGEYMEN AND OTHER REAL PRISONS OF THE IMAGINATION

Lisa Kelly<sup>1</sup>

## PART 1 CHAIN GANGS

Our chains glisten in the high heat of  
the day.<sup>2</sup> A chain of black<sup>3</sup> men,<sup>4</sup> a

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<sup>1</sup> Lisa Kelly, Professor of Law, West Virginia University. This narrative is a fictionalized account of real legal, historical, and interpersonal issues rooted in the social construction of race. I want to thank those who read early drafts and otherwise bore with me as I struggled with the writing of this piece, especially Richard Delgado, Jean Stefancic and Cynthia Mabry.

<sup>2</sup> The chain gang was re-instituted in several states beginning with Alabama in 1995. *Rocky Times Ahead for Chain Gangs*, CHI. TRIB., July 30, 1995. Arizona, Florida, Iowa, Nevada, and Wisconsin followed. All but Arizona and Alabama have done so by statute. See FLA. STAT. § 945.092 (West 1995); IOWA CODE § 904.701 (West 1996); NEV. REV. STAT. § 266.590 (Michie 1995); WISC. STAT. § 303.18 (1998); Pat Flynn, *Chain Gangs*, SAN DIEGO UNION-TRIB., Feb. 25, 1996, at A1. Tennessee and Oklahoma each have at least one county that uses the chain gang. See Wendy Imatani Peloso; *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, n.1 (July, 1997) (hereinafter Peloso). Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW AND INEQUALITY 127, 136 (1997). For a photo essay on the practice in Alabama, see Brad Darrach and James Nachtwey, *Chain Gangs*, LIFE, Oct. 1995, at 65-71.

<sup>3</sup> White inmates are not excluded from chain gangs, but 80 percent of inmates on chain gangs are African American, Mark Schone, *Alabama Bound*, SPIN, Oct. 1995, at 80, despite the fact that 12 percent of the population as a whole and 58 percent of overall prison population is African American.

This racial disparity is consistent with overall

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criminal justice trends which find African-Americans to be over-represented in the criminal justice system generally. A 1990 study reported that for every 100,000 white Americans, 289 were in jail or prison, while for every 100,000 African-Americans, 1,860 were incarcerated. RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 134 (1997). The most recent Department of Justice statistics project the disparity to continue and widen well into the future. According to these figures, "for an American born this year, the chance of living in some part of life in a correction facility is 1 in 20; for black Americans, it is 1 in 4." Timothy Egan, *Hard Time: Less Crime, More Criminals*, N.Y. TIMES, Mar. 7, 1999, at 1. For a graphic representation of the disparity in sentencing of black and white criminal defendants convicted of the same felonies, see A STATISTICAL PORTRAIT OF THE UNITED STATES: SOCIAL CONDITIONS & TRENDS, FIRST EDITION 117, Figure 8.9 (Mark S. Littman, ed. 1998) (compiled from 1996 U.S. Department of Justice Statistics showing that for every crime category, the average length of felony sentences were markedly greater for blacks than for whites).

<sup>4</sup> While Alabama citizens have overwhelmingly supported the use of chain gangs for male inmates, they have been far more reticent about the possibility of subjecting women to the same practices. Ron Jones, the Alabama prison commissioner who first reinstated the use of the chain gang for male prisoners, subsequently lost his job as commissioner when he proposed that women prisoners join their male counterparts. Governor Fob James, Jr., who successfully campaigned on the promise of bringing back chain gangs, demanded Jones's resignation and announced, "There will be no women on any chain gang in the state of Alabama, today, tomorrow, or any time under my watch." Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 478 (1997) (citing Deborah L. Rhode, *Is There Sexual Parity For Prisoners?*, NAT'L L.J., July 8, 1996, at A19)(hereinafter Gorman).

Not every state has been so chivalrous, however. An Arizona sheriff has imposed the chain gang on his female prison population, Walter Berry, *'Equal Opportunity' Sheriff Lets Women on Chain Gang*, THE DETROIT NEWS, Sept. 20, 1996, and Iowa also imposes the chain gang equally upon its male and

sprinkle of white, looped along the side of the highway, we pick up trash and slash at weeds. Our weapons turned either against the earth or one another.<sup>5</sup> We don't sing no work songs; we don't sing at all. Our mouths are too dry; our spirits, parched.

The thought does move through our heads sometimes *why can't we take these sickles and together rise up against the keeper of the keys?*<sup>6</sup> Shoot no, shoot yes, yes they

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female inmates. 1995 Iowa Legis. Serv. HF 215 (West).

<sup>5</sup> In Alabama, on May 15, 1996, a guard shot Abraham Israel McCord to death as he attacked another inmate on the chain gang with a bush ax while on a detail near Montgomery. His death prompted the partial settlement of the Southern Poverty Law Center's (hereinafter "SPLC") challenge to Alabama's reintroduction of the chain gang. Even under this settlement, however, the use of chains persists in the work gangs in Alabama. Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW AND INEQUALITY 127-28 (1997).

Arizona, too, has experienced inmate violence on its chain gang, both in the form of fights and gunshots. A shooting erupted after two inmates began fighting using their garden hoes. The guard first fired a warning shot but one of the inmates refused to stop fighting. As the aggressor proceeded to choke the other inmate with the handle of his hoe, the guard sent forth fifty pellets of birdshot that hit both inmates. Miriam Davidson, *Death-Row Chain Gangs Turn Violent*, ARIZ. REPUBLIC, Mar. 16, 1996, at B1.

<sup>6</sup> This thought not only occurred to, but was acted upon, by those Africans who had been enslaved by white Americans. The slave mutiny on board the Amistad is currently one of the more famous revolts, made popular by the movie, "The Amistad." For written histories of this event see HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW AND DIPLOMACY* (1987); and of course the case itself, *United States v. Libellants and Claimants of the Schooner Amistad*, 40 U.S. 518 (1841). But the Amistad mutiny was by no

would shoot<sup>7</sup> and some of us would surely be dead before we overtook them all.<sup>8</sup> And where would a group of black men wearing white spattered with blood wind up after killing their keepers by the side of the highway for all the travelers of this great state

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means the only slave revolt. One historian has unearthed evidence of approximately two hundred and fifty revolts and conspiracies, each involving at least ten slaves seeking freedom from those who claimed to be their masters. HERBERT APTHEKER, *AMERICAN NEGRO SLAVE REVOLTS* 162 (1963). Others claim that it is impossible to know the exact number of slave revolts or conspiracies because slaveholder paranoia was so high around the possibility of violent revolt that rumors ran wild and reports of organized slave violence must be viewed through the filter of the panic that thrived among slaveholders. KENNETH STAMPP, *THE PECULIAR INSTITUTION* 136-37 (1956) (hereinafter STAMPP); PETER KOLCHIN, *AMERICAN SLAVERY: 1619-1877* at 156 (1993) (hereinafter KOLCHIN) (noting that some insurrections, "such as that in New York City in 1741, may have existed only in the minds of panicked whites"). Nevertheless, actual slave revolts did exist, such as the Nat Turner Rebellion of 1831 in which fifty-nine whites were killed in a revolt that gathered in excess of seventy black rebels. *Id.*

<sup>7</sup> The guards are ordered to shoot to kill any inmate who attempts escape. Alabama Prison Commissioner, Ron Jones, promised the Alabama public, "If they try to escape, our officers are going to shoot them." Adam Cohen, *Back on the Chain Gang*, TIME, May 15, 1995.

<sup>8</sup> The Nat Turner Rebellion triggered a massacre not only of the slaves involved in the revolt but also scores of innocent bondsmen. Those who had not been slaughtered were tried for conspiring to rebel and were either hung or transported out of the Commonwealth of Virginia. STAMPP, *supra* note 6, at 133. The Stone Rebellion of 1739 in Charleston, South Carolina was put down by armed planters the same day. A conspiracy in 1811 involving 200 to 500 slaves armed with cane knives outside of New Orleans was also quickly turned back by armed planters and troop detachments. These rebellions were also "followed by severe reprisals, including the indiscriminate killing of slaves as well as mass executions after regular trials." *Id.* at 135. See also KOLCHIN, *supra* note 6, at 156.

to see? Run off on the guards' horses into the woods?<sup>9</sup> And then what? This ain't no western movie. We ain't no buffalo soldiers.<sup>10</sup> Besides,

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<sup>9</sup> Inmates have long worn distinctive clothing to set them apart from the general population from the striped clothing of old to the more contemporary orange jumpsuits. During the Golden Years of Mississippi's infamous Parchman Prison farm and the final years of the convict leasing system, male inmates wore "ring-arounds," shirts and pants with horizontal black and white stripes, and women wore a similar dress with vertical stripes. DAVID OSHINSKY, *WORSE THAN SLAVERY* 137-38 (1995) (hereinafter OSHINSKY). Current "get tough on crime" nostalgia has resulted in a return to these uniforms. In the words of Mississippi's State Representative, Mack McInnis, "We want a prisoner to look like a prisoner, to smell like a prisoner. When you see one of these boogers a-loose, you'll say, 'I didn't know we had zebras in Mississippi.'" Fox Butterfield, *Idle Hands Within the Devil's Own Playground*, N.Y. TIMES, July 16, 1995, at E1; *Back to the Chain Gang?*, NEWSWEEK, Oct. 17, 1994, at 87.

Arizona is also returning to the stereotypical turn-of-the-century striped prisoner garb. Sheriff Arpaio has boasted about how changing the prison uniform will further his project to return to the days when chain gangs were the norm, "I am going back to the James Cagney movies. I am going to put them in black and white stripes, so when they escape, people will know they are a prisoner. So that's my next big thing." Robert Chalmers, *Meet Sheriff Joe Arpaio of Arizona*, MAIL ON SUNDAY, Nov. 24, 1996, at 10.

Alabama's uniforms are a simple white with the word "chain gang" stenciled on the hat and shirt. See Brad Darrach and James Natchwey, *Chain Gangs*, LIFE, Oct. 1995.

<sup>10</sup> Buffalo soldiers were black soldiers who joined the U.S. Army after the Civil War and at one point made up between ten to twenty percent of the western force. Promised land by the U.S. government, a promise that eventually went unfulfilled, the buffalo soldiers assisted the United States Army in its campaign to sweep Native Americans off the land and make room for settlers. AFRICAN AMERICANS VOICES OF TRIUMPH: PERSEVERANCE (Henry Louis Gates, Jr. et al. eds., 1993). Some historians have characterized the role of the buffalo soldier as that of a buffer

we'd have to act together and plan, trust one another to make a plan. And there's always some house boy ready to sell his collective soul to save his soul-less self.<sup>11</sup> So the chains stay on and we stay tied together and to something older than now but, always and forever, we remain powerless beneath this murderous sun.

Why do they chain us together this way? The reasons are endless. Because they like to. Because it makes them feel strong and in control again. They get off on what they think is our submission as we let them put the metal cuffs around our ankles.<sup>12</sup> The big black

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between the Indian and white western settlers whose role was to protect both groups from each other. See TRAILS: TOWARD A NEW WESTERN HISTORY (Patricia Nelson Limerick, et al. eds., 1991).

<sup>11</sup> Again, the parallels between current conditions and slavery persist. Often the failure of slave rebellions was assisted by the traitor slave who sought to gain an advantage with his master by betraying those conspiring for freedom. For example, a slave revolt planned by Denmark Vesey, a free black man in Charleston South Carolina, in 1822 was given away by a slave. STAMPP, *supra* note 6, at 135. The 1800 Gabriel Conspiracy in Virginia was foiled by a combination of a bad storm and a slave informant named Pharoah. DOUGLASEGERTON, GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1803 at 70 (1993).

<sup>12</sup> As Gorman recounted in her article focusing upon Alabama's chain gangs:

The actions of the chain gang guards serve to strengthen the parallel between slavery and today's chain gangs....'Kneel down,' Sgt. Mark Pelzer ordered to inmate Freddy Gooden on one particular occasion. 'Wearing black leather gloves and gripping a truncheon, he warned, 'You know you're going to have to act right or I'll put this stick on you.'

stud subdued again.<sup>13</sup> Motorists drive out of their way to see us. Mothers with their babies stop and get out of their cars just to watch.<sup>14</sup> They do it because they think it is right, even natural. It is the way it has always been.<sup>15</sup>

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Gorman, *supra* note 4, at 472.

<sup>13</sup> The image of the black man as stud has persisted in our culture since time runneth not to the contrary. Every era has its representation that bears witness to the phenomenon. It has been so widely recognized and commented upon that to choose just a few sources as authority is difficult. However, for a historical recounting of the effect of the stereotype of African American men as prone to rape white women particularly during the Jim Crow era, see A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 144-45 (1996). For more contemporary comments and tales relating to the sexually charged image of the black male in American society, see CORNEL WEST, *RACE MATTERS* 81-93 (1993).

<sup>14</sup> See Brent Staples, *The Chain Gang Show*, N.Y. TIMES MAGAZINE, Sept. 17, 1995, at 62; Adam Cohen, *Back on the Chain Gang*, TIME, May 15, 1995. One Alabama inmate subject to the chain gang wrote:

...[T]he worst part about chain gangs in Alabama is not the young men chained together in groups of five as they urinate and defecate...not the cuts and bruises that the chains inevitably leave on the ankles of the young men..the inadequate or total lack of medical treatment...the total lack of access to the courts...nor the dehumanization of these young men in chains and their abrupt return to the slavery of their ancestors. The worst part of the chain gang in Alabama is that the rest of the world rushed to see it.

*Quoted in*, CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 69-70 (Elihu Rosenblatt, ed. 1996).

<sup>15</sup> It has been commonly said that chain gangs began to die out in the 1930's and were virtually eliminated by the 1940's, a change generated by the popular book published in 1932, *I Am a Fugitive from a Georgia Chain Gang*, by Robert Burns. See Peloso, *supra* note

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2, at 1467. However, a careful review of the cases shows that chain gangs remained a more widespread and persistent practice than it has been believed. Virtually every decade since the beginning of this century through the seventies has seen the use of the chain gang.

In 1972, the Supreme Court declined to hear a case challenging the constitutionality of South Carolina's use of the chain gang as punishment. *McLamore v. South Carolina*, 409 U.S. 934 (1972). See also *Carracter v. Morgan*, 491 F.2d 458 (4th Cir. 1973) (remanding case challenging racial segregation of South Carolina's chain gangs to determine class action issues). Cases also indicate that even in the late 1970's laws remained on the books in Georgia that sanctioned the use of chain gangs. See *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570, n.5 (1979) (noting that Savannah had the authority to enforce any sentence of imprisonment by commitment to the "chain-gang"); *Horry County v. United States*, 449 F. Supp. 990 (D. D.C. 1978) (noting that as late as 1976, chain gangs remained under the control of the Horry County Board of Commissioners); *State v. Hedgepath*, 1989 WL 4423 (Tenn. Crim. App. 1989) (noting in facts that defendant had spent two and one half years on a South Carolina chain gang for an offense that had been committed in 1976).

Inmates were also sentenced to chain gangs in the early seventies and sixties. See *Vandiver v. Manning*, 215 Ga. 874, 877, 114 S.E.2d 121, 123 (1960); *Hayes v. State*, 116 Ga. App. 260, 260, 157 S.E.2d 30, 30 (1967) (defendant sentenced to 12 months on the chain gang for driving while intoxicated); *City of Albany v. Key*, 124 Ga. App. 16, 18, 183 S.E.2d 20, 22 (1971); *State v. Monroe*, 204 S.E.2d 433 (S.C. S. Ct. 1974) (appellant escaped from chain gang in 1970); *Guinyard v. State*, 195 S.E.2d 392 (S.C. S. Ct. 1973) (reciting a statute criminalizing sexual intercourse with a patient or trainee of any state mental health institution and making it punishable by hard labor on the chain gang for a period not exceeding twenty years); *State v. Hanapole*, 178 S.E.2d 247 (S.C. S. Ct. 1971) (appeal of conviction and sentence of 60 days on the chain gang for disorderly conduct and trespass in connection with a protest at the Columbia Metropolitan Airport upon the arrival of President Richard Nixon).

Cases from the 1950's bear witness to both the brutality and prevalence of chain gangs as a method of

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punishment during that era, even for misdemeanors and victimless crimes. *See State v. Williams*, 85 S.E.2d 863 (S.C. S. Ct. 1955) (appeal of murder conviction of chain gang prisoner charged with killing the chain gang captain; describes members of the chain gang beating a new prisoner in the stockades); *State v. Owners*, 80 S.E.2d 113 (S.C. S. Ct. 1954) (prosecution of prison guard, who inflicted buckshot wounds on a prisoner working on the chain gang, for assault and battery with intent to kill); *Bowman v. State*, 91 Ga. App. 52, 54, 85 S.E.2d 66, 68 (1954) (noting that misdemeanors are punishable by a fine of no more than \$1,000.00 and imprisonment, including the chain gang for no more than 6 months); *Lay v. State*, 85 Ga. App. 315, 316, 69 S.E.2d 583, 583 (1952) (noting that one of the state's witnesses was serving on the chain gang for lottery crimes); *Nelson v. State*, 84 Ga. App. 596, 599, 66 S.E.2d 751, 753 (1951) (noting that 12 months on the chain gang was a possible sentence for the unlawful manufacture of intoxicating liquors in a dry county). Indeed, in 1956, the Georgia Court of Appeals made clear that chain gangs had not been abolished in *Chaney v. State*, 89 Ga. App. 157, 78 S.E.2d 820 (1953) (sentenced to chain gang after pleading guilty to possessing non-tax paid whisky). Evidence exists that at least as late as 1952, Mississippi used the chain gang as a method of discharging criminal fines. *Petition for Poole*, 222 Miss. 678, 682 76 So.2d 850, 851 (1955) (petition to disbar attorney for, *inter alia*, keeping money that a criminal defendant had given him to deliver to the court for fines, thereby resulting in the rearrest of the client and his service on the chain gang.)

Similarly, horrible conditions on the chain gang resulted in escape attempts during the forties. *State v. Germany*, 57 S.E.2d 165 (S.C. S. Ct. 1949).

Indeed, Georgia's chain gangs were infamous for their brutality and were often the subject of extradition hearings in cases in which members of the chain gang had escaped to other states to seek refuge. *See Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949), *rev'd sub nom.*, *Dye v. Johnson*, 338 U.S. 864 (1949) (releasing a fugitive from the Georgia chain from extradition because of the cruel and unusual treatment he received there); *Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951) (requiring fugitive to exhaust state remedies before applying to a federal district court for writ). Tennessee continued to use chain gangs at least as late as 1948. *People v. Mitchell*, 63 Cal.2d 805, 810, 409 P.2d 211, 214 (1966) (recounting in facts that

It is familiar in a way that makes you believe that the devil has been alive since creation, now, then and forever working the same evil. We are the pen and ink drawings from another time, pictures of Africans led away from their shores, herded into the hulls of boats, chained together. Chains on the way to the auction.<sup>16</sup> Chains of the first gangs coming after "emancipation" when the keeper of the keys

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defendant had been sentenced in 1948 in Tennessee to serve three years on the chain gang for car theft).

Florida maintained racially segregated chain gangs during the Jim Crow era. *Solomon v. Liberty County, Florida*, 957 F. Supp. 1522 (N.D. Fla. 1997) (voting rights case noting history of racial segregation). *See also United States v. Tucker*, 404 U.S. 443, 444 n.1 (1972) (noting that defendant served a ten-year sentence in Florida beginning in 1938 and that five years and four months was spent on the chain gang).

Like today, the chain gang has not always been confined to the southern states. Even the state of Washington had laws allowing for punishment by chain gang as late as the early 1970's. *See Walters v. Hampton*, 14 Wash. App. 548, 543 P.2d 648 (1975). Evidence exists that at least in the late forties the chain gang was imposed as punishment in Orange County, California. *See Dickson v. Castle*, 244 F.2d 665 (9th Cir. 1957) (Defendant to serve 6 months in the Orange County jail and receive two days good time for every day spent on the chain gang for the crime of issuing a bank check with intent to defraud).

<sup>16</sup> For a good historical account of the slave trade complete with drawings from the period, including the depiction of the use of chains and shackles, *see* MADELINE BURNSIDE, *SPIRITS OF THE PASSAGE: THE TRANSATLANTIC SLAVE TRADE IN THE SEVENTEENTH CENTURY* 35, 96, 99, 113, 122, 148, 154 (1997). Chains are so symbolic of slavery that a chain link appears on the cover of that standard work on slave history by Kenneth Stampp, *The Peculiar Institution*. The argument that chain gangs are symbolic of slavery and, therefore, should be considered violative of the Eighth Amendment has been made in Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441 (1997).

remained needy for some comfortable signs of captivity.<sup>17</sup> Chains today when they say that so many of us have made it that a white man can't get a job.<sup>18</sup>

Some people even say the chains are

beautiful.<sup>19</sup>

Some say they do it to make a statement, to announce to all of the potential wrongdoers in the free world that prison ain't fun, that this is what you'll come to.<sup>20</sup> But what they don't know is that tomorrow's prisoners already have chains of their own tying them to lives that the keepers of the keys know nothing about and will never understand. These aren't the ones who "have made it" and there isn't even a bus that can take them to "your" jobs.<sup>21</sup> Chain gangs just

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<sup>17</sup> After the Civil War, the practice of convict leasing arose under which black men and sometimes even black children were arrested for minor or concocted offenses and forced to serve many years being leased to plantation owners. This practice enabled plantation owners to fill their need for labor left wanting by the demise of slavery. Convict leasing contained many of the same brutalities of slavery which some say were even intensified because, unlike the slaveholder, the lessor of convicts had no interest in maintaining the health and productivity of the individual worker. Among the illnesses that caused convicts to fall to disease was "shackle poisoning" caused by "the constant rubbing of chains and leg irons against bare flesh." OSHINSKY, *supra* note 9, at 45. For law review articles tracing the history of chain gangs, see Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441 (1997) and Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW AND INEQUALITY 127 (1997).

<sup>18</sup> The successful legal assault against affirmative action is evidence of the hostility felt toward people of color obtaining employment over those who believe they are entitled to them. Beginning with the *Croson* case in 1989 and continuing through the Court's most recent cases on racial redistricting, the Supreme Court has consolidated its doctrine against race-based remedies in all contexts. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Each of these cases was brought by disgruntled whites contending that the operation of race-based remedies had operated to deprive them of an opportunity. Professor Derrick Bell has written about racial scapegoating in an era of down-sizing mania in which the usually secure members of the workforce harbor fears that their "jobs and income could go at any time." Derrick Bell, *Racial Libel as American Ritual*, 36 WASHBURN L.J. 1, 5 (1996).

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<sup>19</sup> One article on the re-emergence of chain gangs in the popular, LIFE magazine, began with the disturbing line, "The chains are strangely beautiful." James Nachtwey, *Chain Gangs*, LIFE, Oct. 1995, at 65-71.

<sup>20</sup> "This might get publicity, but it is not a stunt," says Joe Arpaio, the Arizona sheriff who has become quite famous for his use of chain gangs for both male and female inmates, "I'm doing what I was elected to do—get tough on crime. I want inmates to hate jail so much they never come back." Walter Berry, *'Equal Opportunity' Sheriff Lets Women on Chain Gang*, THE DETROIT NEWS, Sept. 20, 1996. The conditions in Arpaio's jail are notorious. Inmates live in tent cities in the desert, work on chain gangs, wear striped uniforms, and are subjected to beatings. Amnesty International and the Justice Department have decried Arpaio's use of excessive force which has resulted in the death of at least one inmate who was being held awaiting trial. See Amnesty International Report-AMR 51/51/97, *United States of America III-Treatment of Inmates in Maricopa County Jails - Arizona*, August 1997 (on file with the author). Scott Norberg's beating and asphyxiation death at the hands of fourteen guards resulted in an \$8,000,000.00 settlement between Maricopa County and his family. See CNN Newsstand Time, *Tough Justice*, aired March 7, 1999 (transcript on file with the author).

<sup>21</sup> Whether isolated within the inner city or in rural southern poverty, poor African Americans are often trapped in an environment that offers little employment and no public transportation that can move them to where the jobs are. For a discussion of the reality and effects of urban "hypersegregation" on poverty among African Americans as well as isolation of African

say amen to the blues that already are. They don't scare anyone into some other world of possibilities,<sup>22</sup> because there isn't one.

Some places we hear have stopped chaining us together and just string the length of chain between each person's ankles. Call that progress.<sup>23</sup>

And when we don't work hard enough they chain our wrists to the hitching posts for hours, our arms and backs extended.<sup>24</sup> And

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Americans in the rural South, see DOUGLAS S. MASSEY AND NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 69, 73, 77 (1993). Poverty and isolation from employment opportunities is not by any means solved by public transportation, even in urban areas. Indeed, of all those employed in the United States, only 5.3% of them arrived at work using public transportation. A *STATISTICAL PORTRAIT OF THE UNITED STATES*, *supra* note 3, at 64.

<sup>22</sup> For a critique of the deterrent effect of chain gangs, see Peloso, *supra* note 2, at 1492-95.

<sup>23</sup> Even under the Alabama case settled by the SPLC, see note 5, the prison administration may continue to use chains and ankle irons to shackle inmates individually while on work details. Lynn M. Burley, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 *LAW AND INEQUALITY* 127-28 (1997). Most other jurisdictions using chain gangs have followed the practice of individually chaining prisoners' ankles together rather than chaining inmates to one another. *Id.* at 137.

<sup>24</sup> The SPLC action challenged the state's hitching post practice, but was unable to settle this issue. The hitching post was used to shackle inmates' wrists to chest-high iron bars for hours at a time. Inmates were left outdoors chained to hitching posts in all weather without water, food or the opportunity to use the toilet for as long as seven hours. This practice was declared unconstitutional after trial before a federal magistrate in January of 1997. See Adam Nossiter, *Judge Rules Against Alabama's Prison 'Hitching Posts'*, N.Y. TIMES, Jan. 31, 1997, at A14. Alabama vowed to continue its appeal, see *'Painful and Torturous Punishment' Must be Abolished, Judge Says*, SPLC REPORT, March 1997, at 1.

when we call for water they laugh and when we have to go they say go 'head.<sup>25</sup>

The old man says he's going to file a lawsuit, a piece of paper to get them to stop. Says he read somewhere that slavery is illegal, even if it isn't dead. Says he been a slave all of his life but he'll be damned if he'll work in chains so some white family in a car can feel good about their governor.<sup>26</sup> Sort of surprised us all. Johnson, he's so old and tired he don't never fight. But if he thinks some lawsuit is going to change this place, he's crazy too. Like slaves asking the master to turn them all loose. But still and all, a tiny mosquito can cause some manner of trouble, even to a rich man. And that's about all we can hope for.

## PART II BOOGEYMEN

Julie was driving to meet her newest client, Johnson Blue, an inmate at the state penitentiary. Her mind shifted gears, as it always did when she was in for a long drive, and readied itself to range widely to fill the anticipated time. Living on the outer edges of the Delta had given her the opportunity to learn to drive easy, to drive as meditation, to drive flat. Her thoughts unwound through the loose ends that she had left behind, the brief

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<sup>25</sup> Prior to the SPLC litigation, Alabama chain gang members' "only toilet facilities consisted of a portable chamber pot or bucket which held all of the inmates' wastes from the day. If the toilet was unavailable, prisoners had to squat on the ground and defecate in public. Prisoners remained chained together while defecating and were given no toilet paper or a place to wash their hands prior to eating lunch." Peloso, *supra* note 2, at 1469.

<sup>26</sup> Alabama Governor Fob James campaigned successfully on the promise of returning chain gangs. See *supra* note 4.



she needed to write, the interrogatories that needed to be drafted, and this new client she had to interview, until finally her thoughts unhinged themselves from this day's plans and floated down somewhere into the past.

Her earliest memory of race was evidence of what had come before, and like most memories, it took some reconstruction to tell it as a coherent whole,<sup>27</sup> not that she ever told it even in part to anyone because it was, for a white woman in her position, not pretty. What she remembered was not the whole story, beginning with when she woke up that morning and ending with when she went to bed that night. What she remembered was the moment, the turning of the corner, the image and the fear.

She must have been very small because she felt that she was wearing a short, puffy, little girl dress, the kind her mother had made her wear to go shopping downtown when she was four or five years old. No doubt she also was wearing those little white anklets fringed with lace at the tops. She and her mother were near Market Square in Pittsburgh where the air was filled with the rush of pigeons taking off and the smell of fried oysters, old beer and stale garbage. In the way of all five-year-olds, she was not looking where she was going. They were rounding the corner at the Five and Ten when the man stepped in front of her. He was dressed in the whitest of white, except for the blood stain smeared like finger paint down his apron, and his face was the blackest she had ever seen. He seemed huge, a giant. He was a strong man, not too young, definitely a grown-up. He was carrying a black tub high

up on his shoulder and she could not see into it. Her eyes went quickly from the bloody apron to the black face.

She jumped back out of the way, too startled to make a sound. What she remembered with certainty was the rush that adrenaline causes, the rush that plants a memory in your mind not like a whole and happy story with moving pictures, but like a graven image, like the headlights of a car about to hit you as you step out into the street without looking.<sup>28</sup> What was planted in her mind forever was the image of a black face grimacing against a white uniform.

This was the thing, the damndest thing—the blood, while it may have deepened her fear, was not what caused it. She could tell the story that way, because it would provide the little girl with an excuse, it would make the fear seem more understandable. But that would not be the truth. Her grandfather and uncles were butchers. She had seen bloody aprons before. She had learned not to turn away as they slit the throats of squealing pigs hung high by their hind legs; she had seen cattle heads in push carts at the slaughter house and had become numb to such brutalities. The unattractive truth was that the fear came from the blackness thrust before her.

What happened next was surely uneventful. She may have gone to buy buttons or to the penny candy store; she may have bought shoes in the little row of shoe shops around the corner, as she and her mother had done so many times before. She could finish the story that way, but she was

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<sup>27</sup> For an exploration of the construction and reconstruction of memory, see JOHN KOTRE, *WHITE GLOVES: HOW WE CREATE OURSELVES THROUGH MEMORY* (1995).

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<sup>28</sup> New brain research shows that fear is processed and stored differently and more permanently than other emotional responses. See Stephan S. Hall, *The Anatomy of Fear*, N.Y. TIMES MAGAZINE, Mar. 7, 1999, at 42-44.

not certain. All she knew now was that by the age of five she had already become terrified of a black man's face.<sup>29</sup>

This was probably one of her first authentic memories, not the kind created by photographs in albums or stories retold by relatives. Who would ever have told her this story? Who would ever have pinned a photograph of her terrified face in the family's dusty scrap book? Her mother probably hadn't even noticed, but this was a moment of being as seeped in tradition as her First Holy Communion and as ancestral as the sepia-toned photo of her grandfather's windswept hair on the deck of the ship he boarded to come to America. Still, this memory was beyond nostalgia; it was more like scent or taste or instinct.

Now, with adult eyes, she reconstructed the truth about her first memory of a black man. He was older, a working man, maybe he worked in a kitchen or maybe he too was a butcher balancing a heavy tub of meat that he was taking from the market to a restaurant nearby. His stride was heavy and determined. He knew where he was going and why and he just wanted to get there before he dropped the meat or hurt his back. He was not out to scare little white girls in their pinafores.

She thought that probably he had a family and that he had arrived at work very early that morning, that his day was well underway when her trip downtown was just

beginning because, after all, the downtown stores did not open until 10:00 a.m.. He probably had ridden one of the early busses and had been cutting meat for several hours by the time she had stepped onto the city curb with her mother. She saw him going home at the end of the day on his bus. At his house, he would say grace before his family ate dinner, listen to his wife talk about her day, ask the children if they had finished their homework, and finally go to bed tired. And not once mention the little white girl who jumped out of his way as he was walking from the butcher shop to the steak house down the block. If he had noticed her at all, had seen the terror in her eyes, she was just another one of the daily snubs that he had to choose whether to ignore, challenge or endure, maybe with a flicker of anger over what white people must teach their little children.

She kept this memory with her now that she was grown and a lawyer, not that she could have dispelled it, because it was stuck there inside her. She remembered it now because she was certain from the pleadings she had reviewed that Johnson Blue was a black man. She had exhumed this memory many times before in order to tell herself how silly racism was; the frightening image and the conscious denial of it were her talisman against the creep.

She told herself that she had examined, indeed studied, the error of her little girl ways and now she had a job to do, and as a new lawyer, she was excited about doing it. She could hardly imagine a better case to be appointed to handle. It was just the type of work she had moved South to do. The senior partner had said that usually inmate cases were dogs-- a lot of trouble to drive all the way to see your client who would want to talk your ear off complaining about something like

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<sup>29</sup> For analyses of the reality and impact of "negrophobia" on both daily life and legal theory, see JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997). For an early and groundbreaking work on the inadequacy of current legal analysis in addressing unconscious racism, see Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

not being allowed seconds for dessert.<sup>30</sup> The court always hit new lawyers with them because those still wet behind the ears felt that they couldn't say no. But this case was different; it presented a real challenge with some real constitutional meat on its bones.

The magistrate's clerk had invited her over to review the file before she accepted the appointment. She saw the hand-written pleadings, neatly lettered but poorly spelled, and the complaint, as best as she could discern, concerned the prison's resumption of the chain gang practice.

Johnson Blue had couched his claim in the Thirteenth Amendment, and alleged that it was slavery— she might have to change that she thought<sup>31</sup>-- but nevertheless this was an interesting complaint. Could even be called "law reform." As she drove down the flat highway to meet him, visions of "class action" danced through her head.

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Johnson Blue had been locked down today, and he didn't know why. Most of the others had gone for breakfast at 5:15, as always, and were moving out into the fields

by 6:00.<sup>32</sup> Some of those picked for the chain gang would start breaking rocks for gravel in the yard at dawn, and others would move out to the highways to pick up trash and clear weeds. Both would work ten to twelve hours a day.<sup>33</sup>

He was told he had a visitor, but it was not visiting day, and since he had been on the chain gang he was not allowed visitors anyway.<sup>34</sup> Immediately, he thought of death. Sometimes they'd let someone come if family had died, even if it weren't a regular visiting day, even if you were on the chain gang. Lord, he prayed, let it not be his mother. Surely not his younger brother, Robert, or his sisters. Hopefully, not Dante, his teen-aged son.<sup>35</sup> If it were Johnson's step-daddy, he'd have to

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<sup>32</sup> The prison farm replaced the convict lease system in the South. The prison farm inmates began their days early, at 4:30 a.m. for breakfast so that they could be out in the fields beginning work by dawn, OSHINSKY, *supra* note 9, at 143, just as Alabama's chain gangs began their days at 4:30 a.m.. See Brad Darrach, *Chain Gangs*, LIFE, at 65. The prison farm continued as the main structure for many Southern prison systems. Some are even returning to privatized farming. See John Haman, *\$27.25 a Day and All the Soy Beans You Can Reap*, ARKANSAS TIMES, May 10, 1996, at 11-13.

<sup>33</sup> Peloso, *supra* note 2, at 1468-72.

<sup>34</sup> The Alabama regulations provide that those on the chain gang are not permitted visitation. Although the denial of visitation was challenged by the Southern Poverty Law Center in their litigation, it remains as one of the issues not settled by the parties. *Id.* at 1471-72.

<sup>35</sup> That an African-American parent would worry about the death of his teen-age son is not unusual. Beginning at age 14 and continuing throughout virtually every year of his life, an African American male is more than twice as likely to die than a white male. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 89 (1997). Within the age group of 15 to 24 years of age, the death rate for African American males for injuries caused by the homicidal use of firearms is more than ten times that of the rate for white males. *Id.* at 102.

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<sup>30</sup> In congressional hearings on the Prison Litigation Reform Act, the frivolous nature of many prisoner lawsuits was offered as the justification to curtail the rights of inmates to bring federal actions. Among the examples of frivolous cases reportedly brought by inmates were complaints concerning bad haircuts by prison barbers and being served chunky rather than creamy peanut butter. See 141 CONG. REC. S14611-01 (Sept. 29, 1995) (statement of Sen. Dole).

<sup>31</sup> The Thirteenth Amendment contains an exception allowing involuntary servitude as criminal punishment, "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party has been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

pause at the edge of emotion and figure his right feelings before jumping into grief or relief, coldness or anger, but he doubted that his step-daddy's death would warrant such a visit from anyone. They'd probably just put it in some letter, mention it in passing along with uncle's high blood pressure and auntie's diabetes.

All of them had stopped coming around even on visiting days a long time ago. His mother was old, and had long ago written to say she couldn't make the trip no more; she had been faithful, more faithful than anyone else, and she still sent her letters down in handwriting that grew more crooked every year. His sisters were scattered to the four winds, uprooted by men who took them to Chicago or Detroit, promising a better life, some place else, anyplace else.<sup>36</sup> He didn't know whether any of them had found it, but he knew that his youngest sister, Edna, had lost a leg to sugar in Chicago, and her cowardly husband up and left her there. Whenever he thought of Edna now, he imagined her— one-legged and stuck in a tattered oversized chair in a dark apartment on the twentieth floor of some project. Her husband, now *he* should be the one doing some time.

Johnson's brother, Robert, wrote at

Christmas and sent him a birthday card every year, news about his kids mostly, what all they been doing. He thought probably Robert's wife wrote it; the handwriting and type of talk wasn't no man's. She was a good Christian lady who believed in standing by family in times of trouble, so long as they didn't stand too close to *her* babies. His nieces' and nephews' school pictures would spill out of the card, all smiling in their colorful sweaters and pressed shirts, their hair all neatly clipped or braided in those big wide soft braids that showed their mama had spent some time getting them just right. Yes, indeed, those children were clean. But he had never seen them in person. His little brother had done alright for himself. He was a respectable man. Each year, the children grew to look more and more like Johnson and his brothers and sisters, how they might have looked if they'd come up in a different time with more money and their rightful daddy. He was proud to think of them and tucked the cards and letters away in his cardboard box marked "personal mail."

Dante's mama refused to bring Dante by anymore, said that he had grown buck wild as it was and didn't need to be lookin' up to no daddy wearing prison whites. Her words stung and made Johnson angry at first, and he sent her a letter blessing her out good. He put the letter in at mail call and knew it was a mistake before the day was up. He wished he could creep into the mail room and sort through the mounds of envelopes to retrieve it and rescue himself from the wrath he had just brought down upon his head, but what was done was done. Afterwards, he just felt lonesome, knowing she had long ago found herself some other man, and now Dante was probably lost to him too. He sent her a letter the next day saying he was sorry for all the nasty things he had said and he guessed he felt the same way she did; he didn't want his son

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<sup>36</sup> Beginning with the Great Migration early this century, African Americans have sought economic advancement by leaving Southern rural farming communities for Northern and Midwestern cities, particularly Chicago. *CROSSING THE DANGER WATER: THREE HUNDRED YEARS OF AFRICAN AMERICAN WRITING* 455 (Dierdre Mullane, ed. 1993). While the bulk of individuals leaving during the early part of this century did not own the land that they worked in the South, even African-American rural land ownership has decreased by over two-thirds since 1910. U.S. Commn. On Civil Rights, *The Decline of Black Farming in America* (1982).

to be thinking that being a man meant being in prison. Just write and let him know about what Dante been doing. Please. But she never wrote back. Not once. Dante hadn't either, but he knew that he was probably not the writing kind. Johnson never was neither 'til he had been here awhile.

So he sat there in his cell, wondering what the bad news would be, imagining the deaths of everyone in his family, seeing them as they were fifteen years ago when he went in for this last long time. He got ready to grieve. When a c.o.<sup>37</sup> came by his cell, Johnson called out to him, "Hey, Byrd, you know who my visitor is today?"

As Byrd walked on, the correctional officer hollered back, "You tell me, Blue. It's some lady lawyer. I didn't know you was into that kind of stuff," and then with a laugh, "You trying to get pardoned?" The c.o. laughed.

Just then, he remembered his lawsuit and dug through his box marked "legal mail" to find that paper he got about a month ago. He had asked for a lawyer in one of his many letters to the judge because it had all gotten too hard for him to figure on his own-- some kind of motion to dismiss had been sent to him-- and he tried to stay away from the jailhouse lawyers who were in it for themselves. They either wanted a piece of your change or they did it to drive the administration crazy and lord knows what all they might write in his papers that he didn't mean and couldn't follow. He had never seen the sense in all that if you hoped to do good time and get out before all your hair went silver. He did get an answer from the judge. As best he could make out, her name must be Julia Nagy. What kind a name was that?

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Julie drove on southeast, further away from the state capitol where she worked. The highway out of town began as a four-lane but after three or four exits tapered to two. For several miles, the road was lined on both sides by dense thickets of pine trees. There wasn't much to see traveling through that green tunnel. A fat black crow pecking at a dead armadillo. Hawks floating back and forth across the road at slow intervals against the blue "V" of sky.

After about thirty miles, the pine trees dwindled and gave way to fields with dry dirt roads that cut through them, splitting the cotton fields from the soy. And the flat horizon opened up on both sides of the road. Every mile or so, stationed far back away from the main road, surrounded by large shade trees, there would be a brick home. Most of them were large but simple ranch-style homes built within the last twenty years, with shiny new pickups parked in the driveways.

For a good ten miles, Julie got stuck behind an old truck with splintered wooden boards for a tailgate and rusted side panels. It chugged and rattled and slowed her pace to a crawl. As she drove behind it, her eyes had more time to linger on the horizon, and there she saw a home that was much older and grander than the rest. It had stately columns and a first and second floor porch. Arched shade trees lined both sides of the long drive leading up to the entrance. Magnolias bloomed in large fists of white near the screened-in side porches. Wisteria dripped purple on a trellised gate. Crepe myrtle and yellow roses mingled in the garden. Her imagination lingered over who lived there, which long prominent family still maintained a homestead from an era that others pretended to forget.

Not too far from the shrouded mansion

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<sup>37</sup> "C.O." is short for "correctional officer."

but closer to the road stood homes that seemed to sag under the weight of their own small porches, some screened-in and some open. The homes were put together with boards nailed this way and that, some painted white, some blue, some not painted at all. She spied an outdoor pump with buckets circling it. Overalls and t-shirts drooped on clotheslines beneath the hot sun. Dusty yards were swept clean, no grass, but geraniums bloomed out of unusual containers— old coffee cans, rusty washtubs, car tires painted white— on the perimeters of the yards. Large oil drums that served as grills sat out next to tables.<sup>38</sup>

In some of the yards, old women sat in metal chairs fanning themselves while the youngest grandchildren played near their feet. Older children ran around and in between the houses; they played tag without seeming to notice the sun beginning to bear down on them.

It was noon and the heat was rising from the fields, from the road; it rippled the air. The irrigation equipment spiraled through the fields like metallic tumbleweeds, their rolling finally came to a stop on the flat plains. They were controlled by automatic timers that simultaneously switched to off all through the fields as the last of the mist evaporated over the crops, catching rainbows in the spray. A single-engine plane swooped down low over the fields. It sprayed the crops, the grandmothers and their grandchildren with clouds of pesticide.

It was then that she saw them, when the plane zipped above their heads. Black men in white bent over and swinging their arms in

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<sup>38</sup> For the African origins of the swept yard, outdoor kitchen, and other landscaping practices in the rural South, complete with photographs, see RICHARD WESTMACOTT, *AFRICAN-AMERICAN GARDENS AND YARDS IN THE RURAL SOUTH* (1992).

a slow unsteady rhythm. Only two white men worked among them. The only other white men sat astride the horses. She had a camera in the backseat of her car. She pulled over on the other side of the highway to take pictures. Some photographs might come in handy for the litigation, she thought. Her eyes watered as she stepped out of her car and walked into the billows of gas.<sup>39</sup> The men who swiped at the grass looked like ghosts in the mist, all chained together, dragging slowly forward, bearing weary misery. She zoomed in to catch the sweat that dripped from their chins. As she examined the faces through the lens, one turned to look at her. Anger simmered beneath the features. She was startled but snapped the shutter in time to catch his rage. *What the hell did she think she was doing? This ain't no tour. Do I look like some friggin' animal in the zoo?*<sup>40</sup> She scuttled back to her car and closed the door. She wished she could explain her noble reasons, that she was there to help, but to him she was just another white person passing by, enjoying the sights.<sup>41</sup>

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<sup>39</sup> In *Sampson v. King*, 693 F.2d 566 (5th Cir. 1982), an inmate challenged as unconstitutional under the Eighth Amendment the practice of forcing him to work in fields recently sprayed with pesticide. The Fifth Circuit reversed the magistrate's ruling in favor of the inmate and held that the safety codes set by private organizations and standards suggested by experts are merely advisory to prison administration." A prison farm which adheres to the reasonable customs and usages of the surrounding area cannot be said to be imposing cruel and unusual punishment." *Id.* at 569. See also *Jackson v. Cain*, 864 F.2d 1235, 1245 (5th Cir. 1989).

<sup>40</sup> People drive for miles to witness Alabama's chain gangs at work on the highways. Christi Parsons, *Tourists, Other States Curious About Alabama Chain Gangs*, CHI. TRIB., May 10, 1996, at 10 (hereinafter Parsons).

<sup>41</sup> *Id.*

Julie closed the vents in her car, got back on the highway and accelerated.

When she saw the sign for the turn off to the penitentiary, Julie's heart started uncontrollable poundings in her chest. She had never been to a prison before. The idea of seeing a side of life previously hidden to her had sounded exciting before, but now it was becoming real. In a few minutes she would be there and she would have to say something. If she could catch her breath. She could still see the face of the inmate from the chain gang glaring at her. She felt young and stupid, sheltered and alone, and incredibly white, as she struggled hard to remain in control of her sudden anxiety.

The land around the compound stretched out flat into the horizon on both sides of the dirt road. The inmates were working in lines in the fields. They wore their white uniforms with long sleeves and long pants. White caps on their heads. Most of them were black.<sup>42</sup> Their hoes moved up and down like old, dirty typewriter keys clattering away at the writing of a story as old as the dirt itself. Armed guards sat astride horses, their hooves stomping as they stood restlessly in place.<sup>43</sup>

As her car rocked slowly down the dry rutted road, she thought that this was a place that no one she had grown up with ever would have imagined her to be. She knew not to tell her parents about this trip when they called last weekend. They would have said, "Be careful." They would have worried and made her promise to call as soon as she returned. Maybe a few minutes later, her father would have called back and demanded, "Don't go." All her life she had been told to be careful, of men in general, and of black men in particular. Be careful of all men because they are only interested in one thing. Be careful of black men because they are all criminals and, of course, were even more interested in that same one thing than white men were.

And growing up in her working class neighborhood of orange brick ranch houses each one the same, there was little to contradict these truisms. The newspaper showed pictures of black men arrested or wanted for this, that or the other thing. The evening news was a series of stories about black men being led off out of their houses with their hands cuffed behind their backs, their heads being pushed below police car doors.<sup>44</sup> Her father carried a gun under the seat

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<sup>42</sup> A 1992 survey of 38 states and the District of Columbia showed that 54% of all those admitted to prison were African-American, even though African-Americans constitute only 12% of the population. JOHN IRWIN AND JAMES AUSTIN, *IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE* 23 (1997) (hereinafter IRWIN AND AUSTIN).

<sup>43</sup> Prison farming continues today as part of a long tradition, particularly in the South. For a detailed description of the conditions at one long-standing prison farm that continues in operation today in Arkansas, see *Holt v. Sarver*, 309 F. Supp. 362, 369-72 (E.D. Ark. 1965). For a report on the history of farming operations in the Arkansas prison system and the recent shift to private farming prisons for profit there, see John Haman, *\$27.25 a Day and All the Soybeans You*

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*Can Reap*, THE ARKANSAS TIMES, May 10, 1996, at 11. For a more in-depth look at the historical practice of convict leasing, chain gangs and prison farming with convict labor, see generally DAVID OSHINSKY, "WORSE THAN SLAVERY:" PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996). The privatization of prisons continues as a trend nationally. See Associated Press, *Contract Signed for State's First Private Prison*, THE DAILY PROGRESS, July 12, 1998, at B1 (reporting on Virginia's private prison contract with a Nashville-based corporation already operating 45 prisons in 11 states, Puerto Rico, Australia and England).

<sup>44</sup> See ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM* 40 (1997) (relying upon, Robert Entman, *Journalism Quarterly*, Vol. 71, No. 3,

of the car because he had to work the 3 to 11 shift at the slaughterhouse. Just walking to the parking lot was risky, even for a tall, big-boned white man. Never know what they might do to you, a little white girl.

Her life had been full of prohibitions and strictures developed for her protection. Never go downtown on Sunday. The stores are closed, the buses don't run but once an hour, only black people are there. Never go out at night anywhere by yourself. If a group of black men are walking toward you, cross the street, just in case. Never go to the North Side, the Hill District or Manchester, no matter what time of day it is, no matter who you're with. If you must drive through Homewood, on your way to the slaughterhouse, lock your car doors, race through yellow lights, and if you have to stop at a red light, don't look into the eyes of the people standing on the street corners. Better safe than sorry. Be careful.

When she lived in Pittsburgh to go to college, she was told, "Do your grocery shopping in the day, always avoid alleys." or "Never take *that* bus, you might wind up where you don't want to be." And of course, never, never, never, never— there weren't enough "nevers" that could cover this one— go out or be seen socially with a black man. This ultimate rule guaranteed that she would never learn enough to challenge any of the others.

At moments like this, Julie longed for her grandfather. He had come to America on the run from the Nazis. He had spent time in a concentration camp just for being a dark-eyed Hungarian in the Nazi path. They had

thought he was a gypsy.<sup>45</sup> When he arrived here he opened his own butcher shop, using borrowed money from the Hungarian Club. He served his neighborhood of other immigrants who had come from all over Europe, on the run from the Nazis or the Communists or famine, but as the years went on, the immigrants died, the mills closed and the neighborhood changed. When his sons and daughters said, "Apa,<sup>46</sup> you have to get out of here. Close your doors before something bad happens to you," he stayed and continued to sell his penny candy and the kolbasi that his new customers called "Polish." When his children nagged him, sometimes bringing up the plummeting value of his property, he would smile and answer his children, "If I close, where will people here buy their groceries? And what will I do? Live with one of you? People are friendly. If you smile, they smile. People are people. I'm fine." Julie's grandfather eventually did die, of emphysema, when she was twelve years old. In the end, it was the steel mills everyone loved that killed him, not the customers whom everyone feared.

So there Julie was, a lawyer who wanted for just three minutes to sit in the peace of her grandfather, to hear what he would have to say about this. Her heart pounded like a child startled awake by a nightmare she couldn't remember. She felt her palms sticking to the steering wheel as she guided her car over the rutted road leading to

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<sup>45</sup> An estimated 500,000 Gypsies were killed by the Nazis during the Holocaust, 21,000 of them at Auschwitz between February 1943 and August 1944. For a harrowing account of the Nazi persecution of the Gypsies during World War II, see ISABEL FONSECA, *BURY ME STANDING* 241-77 (1996).

<sup>46</sup> "Apa," pronounced "Uh-puh," is a Hungarian word for "daddy."



the gravel lot. *People are people*, he would say, as though a good heart and a smile could bridge every divide.

When she was growing up she was taught that sin was a stain upon your soul. Some stains would come out. Some stains were so indelible that even the confessional couldn't dispel them. This fear that she held fluttering like a bird in her chest, this fear with a life of its own, was of the mortal variety. She had tried to remove its stain, had been scrubbing at it for so many years. She had tried every cleaning agent she knew; she had read; she had meditated; she had played any number of mind games with herself. And just when she thought she had it conquered, a nightmare would visit her or her body would react in these inexplicable ways. But she had not faced it head on, in person.

As she approached the prison with its tall brick tower standing sentry, she felt ready to be free. Suddenly, in the gravel lot of the prison, with her car still idling, she realized that this case was as much about her freedom as his. Her desire was more than curiosity. Her excitement about representing Johnson Blue was more complicated than mere idealism. Was it selfish to feel this way, to look for salvation in someone else's prison? To find keys to unlock secrets for her when she was assigned to unlock his? Or was it real and good and right to admit that in some strange way maybe she needed him as much, maybe even more, than he needed her?

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They met in the large visiting hall, but since it was not visiting day, only one round table with two metal folding chairs stood ready for them in one corner of the room. The hall reminded Julie of her high school's auditorium, grey linoleum floors, white cinder-block walls. Flourescent lights buzzed

on the ceiling against the steel rafters. She sat there alone for quite some time waiting for them to bring him out. She had rearranged her file, her yellow legal pad and her array of pens several times. She had moved the chairs from their original positions facing each other to more of a side-by-side angle. Her jangled nerves had calmed down some now that she could slip into her role, surrounded by the accoutrements of her new-found trade. She reviewed a case she had copied about cruel and unusual punishment while she waited.

Finally, the steel door in the front of the hall clanged open and a guard led Johnson Blue over to the table. His ankles and wrists were both in cuffs and chains as the guard sat him down in the chair without a word. The guard walked just a few yards away and leaned against the wall, his eyes fixed on this unlikely pair.

Johnson looked at her. Lord, she was a child, he thought.

They said their brief and nervous hellos. Then, after a moment's pause, she said to the guard, "Sir, excuse me, could you please take his cuffs off?"

The guard looked at her and asked, "Are you sure?"

"Yes, very. The legs too, please."

And while he was removing the chains from Johnson's legs and hands, she added, "And would you mind terribly much if you gave us some privacy?"

Now the guard was beginning to get irritated, "What do you mean?"

"Well, Mr. Blue is my client and what we have to say to one another is protected by the attorney-client privilege. It needs to remain confidential," she explained in a voice that betrayed that she was fresh from the classroom. Her words sounded more like a student giving her answer than a lawyer naturally asserting herself.

"I am not leaving this room," he said emphatically and with a look that said he would protect her from her own foolishness whether she wanted him to or not.

"Alright then, how about if you stand over there by the door where you came in? And we'll speak quietly."

The guard raised his eyes in exasperation and said, "It's your funeral." He wandered back over to the door. "Behave yourself, Blue."

"I'm sure he will be the perfect gentleman," Julie called out to the guard's back.

Julie was feeling better already. She had looked under the bed and discovered that there was no boogeyman residing there. In fact, she was so relieved that she was busy bestowing upon her new client manners that she had no way of knowing whether he possessed.

For his part, Johnson thought she might be young but at least she's got some guts. Still, something about her also made him nervous. Here she was with her little fresh self acting like she was his savior and all they had said was hello. But at least she appeared to be on his side, which was different than what he was used to or what he expected. He had heard that lawyers never wanted to be appointed to prison cases and that they often didn't even bother to come down and talk to their clients. Some of them just rolled over and played dead for the other side. At least she seemed to want to be here.

"Mr. Blue, my name is Julie Nagy. Did you receive a copy of the order appointing me to your case?"

"Yes, ma'am," he found himself saying ma'am just like his mama had taught him to address the most dangerous of all creatures, the white woman, and he resented her for drawing that out of him so quickly. At

least she called him *Mr. Blue*, there was something unexpected that changed the tone of the relationship in that. But then he wondered, *what's she trying so hard to prove?* That she thinks we're equal or something? Does she really believe that? It would be easier if she were a man or if she were more like the white women who weren't supposed to be on his side. At least then he'd know the routine; they'd both know the routine.

"Good, I'm looking forward to helping you with your case. I saw the chain gangs on my way down here and I agree with you that they should be done away with. I'm not sure at this point what theory we can use to do away with them, but I am thinking we might have to change the basis of your complaint from the Thirteenth Amendment to the Eighth." She could see his eyes glazing over already, "But we can talk about that later. First, why don't you tell me about why you decided to bring this lawsuit and what your experience on the chain gang has been?"

These felt like very personal questions to ask within just the first few minutes of a conversation. Johnson's head was a jumble. How to answer them, whether to answer them with his truth.

"I filed the paper because I didn't like the feeling that working in chains put on me." There, he had summed it all up for her and now he was going to settle back and listen to her some more. Maybe she'd go back to her law talk.

"Could you tell me more about that? When did they put you on the chain gang?" Julie stood ready with her pen and yellow pad.

"Right after they started them up, they put me on. I asked them why because I hadn't been in any trouble for a long time. Probably

the last time I was in the hole<sup>47</sup> was eight years ago. They said that I was a habitual<sup>48</sup> and that made me right for the gang plus they felt that I wouldn't cause any trouble out there. They acted like I was lucky, like it was some sorta reward. They told me *don't worry Blue you'll get off the grounds and the work's easier than the hoe squad.*"

"Is the hoe squad what I saw when I was driving in? The men out working in the fields?"

"Yes ma'am. That's what I did before the chain gang."

"Is the chain gang work easier?"

"Well, I don't know if I'd say that." Johnson stopped to think, some things ought to be so obvious they shouldn't need to be said, and he added, "It ain't easy working in chains."

"No, I guess not. Have you experienced any injuries on the chain gang?"

"What you mean?"

"Well, have you been physically hurt in any way?"

"Not really. No more than on the hoe squad. Probably been hurt more on the hoe squad. Once a new boy brought his hoe down on the back of my leg. Had to have thirty stitches. Nothing like that's happened on the gang yet, but it could, easy enough."

"Then, tell me, Mr. Blue, why did you file this complaint about the chain gangs instead of one about the hoe squad?" Julie was beginning to see ambiguity in the case. The

chain gang is bad but the hoe squad may be just as bad, maybe worse. And yet forced hard labor is constitutional in the prison context.<sup>49</sup> Is one cruel and unusual if the other

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<sup>49</sup> The exception for involuntary servitude in the prison context has long been recognized and reaffirmed by the Supreme Court and lower courts as well. *Wilson v. Kelley*, 294 F. Supp. 1005 (N.D. Ga. 1968), *aff'd*, 393 U.S. 266 (1968); *Pollock v. Williams*, 322 U.S. 4, 17 (1944) ("Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime."); *United States v. Reynolds*, 235 U.S. 133, 149 (1914) ("There can be no doubt that the state has authority to impose involuntary servitude as a punishment for crime."); *United States v. Pridgeon*, 153 U.S. 48, 61 (1894) ("while the act. . . does not specifically authorize the imposition of 'hard labor' as part of a sentence of imprisonment, still it was competent for the court to sentence the party convicted to imprisonment, still it was competent for the court to sentence the party convicted to a penitentiary where 'hard labor' is a part of the usual discipline"); *Ruark v. Solano*, 928 F.2d 947 (10th Cir. 1991); *Mileska v. Collins*, 900 F.2d 833 (5th Cir. 1990); *Wendt v. Lynaugh*, 841 F.2d 619 (5th Cir. 1988) (not a violation of the Fifth, Eighth or Thirteenth Amendments to compel plaintiff prisoner to work in the Texas prison system without pay); *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985); *United States v. Drefke*, 707 F.2d 978 (8th Cir.), *cert. denied sub nom.*, *Jameson v. United States*, 464 U.S. 942 (1983); *Omasta v. Wainwright*, 696 F.2d 1304 (11th Cir. 1983); *Draper v. Rhay*, 315 F.2d 193 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1964), *reh'g denied*, 375 U.S. 982 (1964); *Patrick v. Staples*, 780 F. Supp. 1528 (N.D. Ind. 1991) (claim that requirement of working in prison kitchen violated the Thirteenth Amendment was frivolous); *McDonnell v. United States Attorney General*, 420 F. Supp. 217 (E.D. Ill. 1976) (not a violation of the Thirteenth Amendment to require the plaintiff to work in a prison brush factory); *Howerton v. Mississippi County, Arkansas*, 361 F. Supp. 356 (E.D. Ark. 1973) (not violative of Eighth or Thirteenth Amendments to force prisoners to work on Arkansas penal farm or two contract them out to other government units outside of their county of incarceration); *Sims v. Parker Davis & Co.*, 334 F. Supp. 774 (E.D. Mich. 1971) (not a

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<sup>47</sup> "The hole" is a term that is typically used as slang for "administrative segregation," a form of punishment akin to solitary confinement in which the inmate is isolated from other inmates and has limited time out of his cell.

<sup>48</sup> Chain gang members are most frequently composed of habitual offenders and those with poor prison records. *See Gorman, supra* note 4, at 453.

is not? And if so, what is the remedy here? Put him back on the hoe squad? The logic was fraying.

"Because I was used to the hoe squad, but on the gang, I was a slave for the whole world to see. I ain't no slave." There, she wanted to know and now he'd said it. Maybe she would pack up her books and go away and he could stop calling her ma'am and she could stop forcing herself to say *Mr. Blue*.

Truth was that the hoe squad was something that he had been doing all his life. When he was a child, his family sharecropped on Mr. Biller's farm.<sup>50</sup> Mr. Biller owned hundreds of acres in Jefferson county, and they had lived in a succession of his houses. Outside of each one, they planted their own garden with eating food-- peas, tomatoes, corn, greens-- supper in their backyard.

Of course, they had spent more time working in Mr. Biller's fields than in their own enterprises. In the spring, they planted. In the summer, they hoed. In the fall, they harvested. Payment was by the sack, and it takes a lot of picking to fill a sack of cotton. So all of the children picked. They picked after school, before school, and sometimes they missed school altogether to bring in all that they could. It had never occurred to Johnson that he could challenge a way of life that still

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violation of the Thirteenth Amendment to compel inmates to work for a private business entities for less than minimum wage); *Fallis v. United States Bureau of Prisons*, 263 F. Supp. 780 (M.D. Pa. 1967) (not a violation of the Fifth, Eighth or Thirteenth Amendments to discipline a prisoner by solitary confinement for refusal to work in prison industry); *Wilkinson v. McManus*, 299 Minn. 112, 216 N.W.2d 264 (1974).

<sup>50</sup> For an account of the history of sharecropping and current African-American land ownership in the rural South, see RICHARD COUTO, *AIN'T GONNA LET NOBODY TURN ME 'ROUND* (1991).

existed outside of prison. Farm work was just what he had always done. He figured that if it was good enough for freeworld folks, no court would find it wrong for them.

Julie continued, "I see, you used the Thirteenth Amendment in your complaint because you felt like you were being treated like a slave, right?"

"I did some readin'. That's the one that got rid of slavery, isn't it?" Johnson was proud of his complaint. He had looked hard in the law library on his own to find the right books to help him. And he had spent a lot of time writing it so it would be just right.

"Yes, it is."

"Well, that's what I want to do, get rid of slavery at this penitentiary."

"Mr. Blue, there is a little problem with using the Thirteenth Amendment in the prison context."

"Oh yeah, what's that?" He was growing tired of this girl. Now she was going to tell him his paper was wrong. But out of force of habit, he threw in, "Ma'am?"

"The Thirteenth Amendment has an exception that says involuntary servitude, or working without pay, is O.K. as punishment for a crime. That's why I'd like to ask your permission to change your complaint to bring in the Eighth Amendment which protects you from cruel and unusual punishment. Then we just have to prove that chain gangs are cruel and unusual."

"If you say so. Ma'am." Johnson pushed back in his chair, and the scraping on the floor echoed off the cinder block wall.

The guard interjected from across the room, "Everything alright over there?"

"Yes, everything is fine, thank you, sir," Julie shouted and then more quietly, she asked, "Mr. Blue, are you angry with me? I didn't mean to offend you. I think I understand what you're saying. You hate the

chain gang because it reminds you of slavery. I can see why. And I think that we can talk about how degrading the chain gang is under the Eighth Amendment theory just as well. We just need to talk about an amendment that the court will be able to consider given that you're an inmate. Do you understand?"

"Yeah, yeah, I understand. You're saying that I may have a case but it's not a slavery case because inmates are allowed to be slaves. Don't seem right to me, but I hear what you're saying."

"Would it make you feel better about this if I told you that when we go to trial, you can say just that, that this chain gang makes you feel like a slave?"

"Some." There was something about the way she used the word *we* that was getting under his skin.

"O.K., do I have your permission then to amend your complaint?"

"Whatever you think is best. You the lawyer."

"Yes, and you're my client, and I want to make sure we're working *together*, not against one another. Are we working together?"

What did she want him to say to that? What choice did he have? He wanted a lawyer. He got a lawyer. She seemed about as far removed from understanding what he'd been through as any human could be. And there was something about the way she talked to him like he was poor and pitiful and yet that *we* were in it together. Made his teeth grind. How to explain it? It was like a mama talking to her child about how *we* gonna take *our* nap now and you know damn well that mama isn't going to take no nap. There ain't no *we* about it. And here she was young enough to be *his* child, telling him what *we* going to do together.

Even so, Johnson swallowed hard,

"I'm willing to give it a try, ma'am," and pushing aside his pride he added, "Thank you for coming down."

"You're welcome." Intuitively, Julie knew that something wasn't right here. She had trained herself shortly after she first moved here to always make sure she referred to people by "Mr." or "Miss." She knew the value of courtesy. She knew that a wrong step early on could spell doom for a relationship forever. And she was aware that "sir" and "ma'am" were important words, used to signify respect, in both black and white society. But it was a slippery business, knowing how to address others and what to allow oneself to be called across racial lines.

"Mr. Blue, could you do me a favor?"

"What's that?" Johnson asked, curious about what he could possibly do for her that she would want.

"Well, I'm from the North, Pennsylvania to be exact, and I'm not really used to being called ma'am. It doesn't seem right coming from you. I mean, you *are* my elder, right? I don't mean to offend. Age is a good thing. I wish I had a few more years on me right about now."

"Yes ma'am, I mean, yes, I guess that's right. You do look some younger than me, I've noticed." This was even stranger; he was not used to a white person talking like this. He didn't know white people even noticed such things. The balance of power, or lack of it, was just in the air they breathed; they couldn't see it or feel it the way he did.<sup>51</sup>

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<sup>51</sup> Critical Race Theory scholarship has recently turned its attention to the meaning of whiteness in the social construction of race. As one scholar points out:

The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this

And if they did, they never let on that they wanted it to change. “What am I supposed to call you then?”

“You could call me Julie, if you like, or Ms. Nagy if that’s more comfortable, either one is fine. Like I said, I’m new at this and I know I might not be what you expected but I promise I’ll give you my best. If I offend you in some way, though, I’ve got to know.”

“I’ll try to keep that in mind, *ma’am*.”

And this time they both smiled. It wouldn’t be easy, but in that moment before the smile died they thought that maybe, with a lot of effort and no small amount of forgiveness, if they both stopped listening to the ways they were stuck with, just maybe, this could work out.

### PART III AND OTHER REAL PRISONS OF THE IMAGINATION

On the way back from the prison, Julie’s mind buzzed. She’d amend the complaint, make it a class action, and ask for attorney’s fees and costs, give them something real to think about. She’d begin by researching the history of chain gangs and maybe even try to get her firm to spring for an historian who could testify as an expert witness about the similarities between today’s chain gangs, the gangs of the past, and slavery. Surely the

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*transparency* phenomenon: the

tendency of whites not to think about whiteness, or about norms, behaviors,

experiences, or perspectives that are white-specific.

Barbara Flagg, *'Was Blind, But Now I See: Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

court would not let stand a practice with such a barbaric past. She’d knit together a case so tight they wouldn’t be able to find any holes to start its unraveling.

She felt so much better. Nearly all of her anxiety had washed away with the final handshake. She found herself humming “Amazing Grace.” Then she laughed at herself and put on the radio instead, but there were only two stations crackling through her speakers— country western or black gospel. On any day, it would have been an easy choice; country was the anthem of that part of her she wanted to leave behind— the drunk uncles, the insomniac father playing the anguishing sounds of Patsy Cline pleading for love after midnight on their old stereo in the livingroom— but today it was even easier. These days, she remained always curious, perhaps hopeful, about finding different ways to look at the world.

She strained to hear the preacher-d.j. who was praying with the sister-caller on the phone. *Yes, sister, thank you for your call. Pray with me. You know the Lord He is not just your doctor, He is your healer. He is not just your lawyer, He is your counselor. Listen and wait on the Lord for He will make a way for you.* The deep yet ragged voice raised and lowered like a ship swaying out on the calming sea. *Let’s listen now to the message in the music. ‘Oh Be Joyful.’ Listen to the Rev. James Cleveland.<sup>52</sup> Be Joyful, sister, all is well.* The chorus of women swayed and rose in a steady beat, joined by the Reverend who took his solo with conviction to the piano,

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<sup>52</sup> REV. JAMES CLEVELAND AND THE GOSPEL MUSIC WORKSHOP OF AMERICA MASS CHOIR, *Oh, Be Joyful*, on THE BEST OF REV. JAMES CLEVELAND AND THE GOSPEL MUSIC WORKSHOP OF AMERICA MASS CHOIR (Savoy Records, Inc. 1993).

drum and keyboard. Scattered applause and encouragement passed through the choir. Julie could not make out all of the words, but she could hear the complexity and certainty in the music. She wasn't used to the voices blending, shouting, exhorting. Occasionally, it seemed to her randomly, one strong woman's voice would shake free from the rest, rise above them with her own testimony at the urging of the male voice. Julie strained hard to hear the words but just as she grabbed hold of a word, a phrase, the voice would fall back into the mass and be lost to her.

As intent on hearing the music as she was, something about it made her uneasy. It was a complicated business. Each song was joy and sorrow, unusual harmony and sudden individuality, praising and demanding; it was a personal message taken straight to God. It was community, and it was so different from church music that she knew, music that relied upon the penetrating chords of the organ vibrating against high granite walls to impress. Here, there was no priest to mediate, to translate the people's prayers and to provide the Lord's answers. Even though this music was not meant for her, and even though she did not comprehend it, she heard it demand something of her, just what she wasn't sure, but it was as though the power of it was coming from within her as well as without. She resolved at that moment to always listen harder and to remember that there was still a lot she didn't know or understand.

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Julie felt so exhilarated by her visit to the prison that she dove right in to researching her newest client's claim as soon as she returned to her office. She did some work at the computer until she realized that she had

used more than her allotted share on a case that the senior partner would find speculative at best. Then it was off to the library where she did things the old-fashioned way, digging through dusty, heavy volumes of cases.

She had always taken for granted that for every injustice there was a violation, for every violation there was a remedy; in short, for every problem, a solution. A professor had once announced to the class that their charge as lawyers was to listen to the client's goal, translate that into a remedy and then work backwards from there to find the cause of action that would result in the desired end. Lawyering was just like some grand jigsaw puzzle in which the law connected seamlessly with the world, all the pieces fit and there were never any pieces left in the box after it was all put together. She had the faith of a biblical fundamentalist that the answer would be found there in the books somewhere if she just searched and then interpreted the text skillfully enough.

Johnson Blue challenged her faith. She looked for every case in which chain gangs played even a small part and learned that they have been in use since Reconstruction. Except for a brief hiatus in the 1980's, Julie could find cases in every decade of this century, and not just in the typical southern states you would expect.<sup>53</sup> There were chain gangs in Washington, D.C., and the state of Washington and in California as well.<sup>54</sup>

In the nineties, at least one person had died on the chain gang<sup>55</sup> and fights and shooting had broken out;<sup>56</sup> today's inmates

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<sup>53</sup> See *supra* note 15.

<sup>54</sup> *Id.*

<sup>55</sup> See *supra* note 5.

<sup>56</sup> *Id.*

were sometimes exposed to long hours<sup>57</sup> and degrading sanitation<sup>58</sup> but the overall brutality was nothing like what had gone on in the past.<sup>59</sup> Today's chain gangs were pale ghosts of the first, flickering shadows against the wall of history. Current chain gangs followed the same contours of the older practices but with fewer gruesome details. In the past, prisoners died routinely on the chain gang<sup>60</sup> and the conditions were so extreme that they even drove chain gang overseers mad.<sup>61</sup> But

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<sup>57</sup> Peloso, *supra* note 2, at 1468-72.

<sup>58</sup> See *supra* note 25.

<sup>59</sup> The difference in treatment between yesterday and today's chain gangs has prompted some commentators to refer to the contemporary practice as "Chain Gang Lite." See Peloso, *supra* note 2, at 1467.

<sup>60</sup> Details of the assault leading to the death of Benjamin Brown, committed to a Tennessee chain gang, as well as the deaths of others can be found in, *Hale v. Johnston*, 140 Tenn. 182, 203 S.W. 949 (1918). The case also recounts the results of the savage beating and the death of at least one other inmate:

The undertaker, who dressed the body, says the deceased had a large knot on the side of his temple, which could not have been made by one blow, and another knot on his left jaw, one on his head, one on the top of his head, and numerous ones on his arms. He says his arms were beaten into a batter and one finger was broken. This assault on deceased was made July 23, 1912. About two days prior thereto, a white man named Gordon was beaten to death by these same guards.

*Id.* at 951. See also *Boswell v. Barnhart*, 96 Ga. 521, 23 S.E. 414 (1895) (action by widow for the homicide of her husband while confined in a chain gang).

<sup>61</sup> *Kennedy v. Williamsburg County*, 242 S.C. 477, 131 S.E.2d 512 (1963) (claimant chain gang prison guard awarded workers compensation for total disability caused by paranoid schizophrenia arising

the cast of characters remained the same— young black men often convicted of minor crimes.

The cases that Julie read involved "Negroes" sometimes as young as 15, often convicted with little or no due process.<sup>62</sup> Prisoners confined as the result of forced confessions made without the benefit of legal counsel. And the chain gang conditions were pure and purposeful torture.<sup>63</sup> More than just working in chains from sun up to sun down,<sup>64</sup> although that was certainly bad enough. Prisoners were chained together both day and night and slept in tiny, overcrowded barracks.<sup>65</sup> Julie saw them there in her imagination, as in the crowded hulls of slave ships, inmates chained together at the waist and ankles lying on top of one another.

Yesterday's cases involved ritualistic beatings by both guards and fellow inmates.<sup>66</sup>

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from his employment).

<sup>62</sup> *Davis v. O'Connell*, 185 F.2d 513, 514 (8th Cir. 1950) (petitioner alleged that he was "of African descent and color and is wanted in the State of Georgia for a crime that he did not commit"); *Harper v. Wall*, 85 F. Supp. 783, 785 (D. N.J. 1949) (petitioner, "a colored boy," in a habeas case was sentenced to an Alabama chain gang at fifteen after being beaten into a confession that he had committed a series of burglaries).

<sup>63</sup> See *supra* note 62.

<sup>64</sup> *In re Middlebrooks*, 88 F. Supp. 943, 946 (S.D. Cal. 1950).

<sup>65</sup> *Id.* at 946-47 (50 or 60 men were housed, chained together, in one large room, 40X50 feet, with beds in tiers).

<sup>66</sup> *In re Hunt*, 276 F. Supp. 112, 116 (E.D. Mich. 1967) (petitioner alleged that while sentenced to an Alabama chain gang, he experienced frequent beatings with a nine pound strap with five prongs tipped with a silver half dollar); *In re Middlebrooks*, 88 F. Supp. at 946; *Harper*, 85 F. Supp. at 785 (petitioner exhibited a scar on his scalp from having been beaten over the head while serving his sentence on an Alabama chain gang); *In re Marshall*, 85 F. Supp. 771, 772 (D. N.J. 1949)



Dog attacks.<sup>67</sup> Twenty pound chains with 15 pound balls, secured to shackles devised with metal picks that cut through the flesh to the bone.<sup>68</sup> No toilet facilities.<sup>69</sup> Sweat boxes.<sup>70</sup> The dipping barrel into which prisoners, chained in a kneeling position were placed and given only tin cups to spare themselves from drowning, while water from hoses filled the remaining space.<sup>71</sup> Disease-infected food.<sup>72</sup> Torturous stocks in which the prisoner's body was bound with wire in

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(foreman of Georgia chain gang "carried a hickory stick approximately four feet long with which he beat the prisoners); State v. Williams, 226 S.C. 525, 85 S.E.2d 863 (1955) (facts stating that "prisoners in the stockade were engaged in holding a 'kangaroo court,' and administering punishment to a new prisoner"); Brown v. Baldi, 378 Pa. 504, 514, 106 A.2d 777, 781 (1954) (petitioner exposed to the court "scars resulting from beatings administered by walking sticks, staves, rubber hoses, and blackjack while working on the Georgia chain gang).

<sup>67</sup> Harper, 85 F. Supp. at 785 (petitioner displayed several scars about his legs which he testified marked the spots where he had been bitten after dogs were released to chase him in a demonstration of what would happen if he attempted to escape).

<sup>68</sup> Brown v. Baldi, 378 Pa. 504, 515, 106 A.2d 777, 781 (1954) (petitioner displayed in open court scars left by shackles); *In re Middlebrooks*, 88 F. Supp. at 946 ("double shackles were used, consisting of a band on each ankle and a chain 14 to 16 inches long in between; 'picts' were also used, consisting of long points emanating horizontally from the band at the ankle).

<sup>69</sup> *In re Middlebrooks*, 88 F. Supp. at 946 (only toilet facilities were large garbage cans which leaked badly and were emptied once a day).

<sup>70</sup> *In re Middlebrooks*, 88 F. Supp. at 946-47 (sweat boxes consisted of small buildings 3X6 feet, without light or heat, into which the prisoner was placed without clothes for up to seven days at a time); *Brown*, 106 A.2d at 782.

<sup>71</sup> *Brown*, 106 A.2d at 782.

<sup>72</sup> *In re Middlebrooks*, 88 F. Supp. at 946; *Brown*, 106 A.2d at 781.

contorted positions,<sup>73</sup> staking inmates into the ground with their bodies stretched wide.<sup>74</sup> The misery was palpable; the moaning seemed to rise up and sing from the pages of the cases like a chorus in some Greek tragedy. This was hell on earth.

Had the prisoners' supplications reached the ears of justice and what remedy had it meted out? Yes and none. Prisoners brought cases, but it was as if the law had plugged its ears, kept the blindfold tied fast and turned quickly away. One court even refused to ban the use of beatings on the chain gang because to disallow them "destroys entirely the efficacy of a sentence to hard

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<sup>73</sup> *In re Middlebrooks*, 88 F. Supp. at 946; *Brown*, 106 A.2d at 782.

<sup>74</sup> The petitioner in *Brown* described the "staking treatment" as follows:

A. They stake you out and stretch you just as wide as they can stretch you and they nail a stake to this hand, a stake to there, a stake to your feet, and a stake to here, putting a chain across your chest and stake you to that (indicating).

Q. When they got through staking you out they did what?

A. They poured black molasses all over your face and all over your body. You are stripped down to your body. They pour black molasses syrup all over you and flies and bees and everything else bite you and stick you and do everything else to you. Also they turn loose the dogs....

After this grim tale, Brown's counsel called the Court's attention to one of the scars resulting from dog bites: 'Two inches horizontally, and about an inch vertically under the left eye.'

*Brown*, 106 A.2d at 781-82.

labor upon the roads."<sup>75</sup>

In *McLamore v. South Carolina*,<sup>76</sup> the Supreme Court had the opportunity to address the constitutionality of chain gangs, but denied certiorari. The case challenged the conditions of South Carolina's chain gangs under the Eighth Amendment, as well as, under the Fourteenth. The prisoners argued under the Fourteenth Amendment that the state had created arbitrarily two classes of prisoners—those who served their sentences in prison with the benefit of rehabilitative programs and those who were committed to the chain gang. Justice Douglas, the lone dissenter, protested the seriousness of both questions:

Does the chain gang fit into our current concept of penology? If not, does it violate the Eighth Amendment? This is an important question never decided by the Court?<sup>77</sup>

and again:

For this Court to refuse to make the decision in this case allows a procedure to exist which arguably has many aspects of involuntary servitude for some while others of the same class are treated in a more enlightened way.<sup>78</sup>

The judicial silence was deafening.

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<sup>75</sup> *State v. Mincher*, 90 S.E. 429 (N.C. 1916).  
<sup>76</sup> 409 U.S. 934 (1972).  
<sup>77</sup> *Id.* at 936.  
<sup>78</sup> *Id.* at 936-37.

Perhaps, the Court was so quiet because it felt it had already spoken in *Wilson v. Kelley*<sup>79</sup> four years earlier. In 1968, the Court in *Wilson* affirmed, per curiam, the decision of a three-judge district court which found that Georgia's "public work camps" did not violate the Eighth or Thirteenth Amendments.<sup>80</sup> Some ten years earlier in *Chaney v. State*,<sup>81</sup> the Georgia Court of Appeals had ruled that the term "public work camp," as used in a Georgia sentencing statute, was synonymous with "chain gang."<sup>82</sup>

But the chorus of voices protesting the chain gang had taken another, less direct route, even before *McLamore*, in what was known as the "chain gang fugitive"<sup>83</sup> cases. Just as slaves miraculously sometimes escaped, so did prisoners on the chain gang. They ran to other states<sup>84</sup> for refuge. The states from which they came sought their return, just as the southern owners had

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<sup>79</sup> 393 U.S. 266 (1968).  
<sup>80</sup> *Wilson v. Kelley*, 294 F. Supp. 1005, 1012 (N.D. Ga. 1968) (citations omitted), *aff'd*, 393 U.S. 266 (1968).  
<sup>81</sup> 89 Ga. App. 157, 78 S.E.2d 820 (1953).  
<sup>82</sup> 89 Ga. App. at 158, 78 S.E.2d at 821.  
<sup>83</sup> *Ross v. Middlebrooks*, 188 F.2d 308, 309 (9th Cir. 1951) ("We have for consideration a so-called 'chain gang fugitive' case . . .").  
<sup>84</sup> States to which chain gang fugitives escaped included: *Pennsylvania-Dye v. Johnson*, 338 U.S. 864 (1949); *Davis v. Ruch*, 380 Pa. 155, 110 A.2d 394 (1955); *Brown v. Baldi*, 378 Pa. 504, 106 A.2d 777 (1954); *California-Ross v. Middlebrooks*, 188 F.2d 308 (9th Cir. 1951); *New York-In re Holloway*, 46 Misc.2d 773, 260 N.Y.S.2d 980 (1965); *Michigan-In re Hunt*, 276 F. Supp. 112 (E.D. Mich. 1967); *Kansas-Wilson v. Turner*, 168 Kan. 1, 208 P.2d 846 (1949); *Missouri-Davis v. O'Connell*, 185 F.2d 513 (8th Cir. 1950); and *New Jersey-Harper v. Wall*, 85 F. Supp. 783 (D. N.J. 1949); *Ex Parte Marshall*, 85 F. Supp. 771 (D. N.J. 1949).

pursued their fugitive slaves.<sup>85</sup> A tug of war resulted in the form of extradition warrants and habeas petitions. The fugitives would detail the horrific facts and circumstances of their convictions and confinement. They paraded their scars and disfigurements before the judges. Sometimes their stories were too sordid to bear retelling by the courts.<sup>86</sup>

A split in the federal circuits developed as to the power of the states to refuse to extradite because of unconstitutional convictions or conditions.<sup>87</sup> Eventually, the Supreme Court resolved these extradition cases by holding that the habeas relief sought was unavailable to any fugitive who had not exhausted all remedies in the courts of the

sentencing state.<sup>88</sup> Inevitably, this ruling resulted in the extradition of the fugitive from the asylum state to the sentencing state where he was instructed to seek his relief.<sup>89</sup> The cases were silent as to what happened once the fugitive was sent back.

A 1987 Supreme Court case, *California v. Superior Court*,<sup>90</sup> made it even more clear that neither the propriety of the conviction nor the conditions of the

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<sup>85</sup> The political tug of war that resulted between the slave and non-slave states was resolved by the passage of the Fugitive Slave Act of 1850, in which Congress required the asylum states to honor a master's claim for the return of "his" slave. See STAMPP, *supra* note 6, at 153. The passage of the Fugitive Slave Act resulted in the emigration of several hundred African-Americans to Canada. DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 58 (3d ed. 1992).  
<sup>86</sup> "We shall not set out in this opinion the revolting barbarities which Johnson and his witnesses state were habitually perpetrated as standard chain gang practice. To perpetrate these atrocities in an opinion is to be unfair to the American scene as a whole and to reflect little credit on this generation for posterity." Johnson v. Dye, 175 F.2d 250, 256 n.11 (3d Cir. 1949).

<sup>87</sup> Two circuits held that the federal court in the asylum state had no power to go beyond an examination of the facial validity of the rendition documents. Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950); Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950). Two other circuits held that the federal court in an asylum state had jurisdiction to inquire into the validity of the detention to which the petitioner would be subjected if returned to that state. Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd sub nom.*, Dye v. Johnson, 338 U.S. 864 (1949); United States ex. rel. Jackson v. Ruthazer, 181 F.2d 588 (2d Cir. 1950), *cert. denied*, 339 U.S. 980 (1950).

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<sup>88</sup> Sweeney v. Woodall, 344 U.S. 86 (1952); Dye v. Johnson, 338 U.S. 864 (1949). Justice Douglas dissented in *Sweeney* as he had in *McLamore*. Again, he detailed the allegations made by the petitioner that in Alabama he had been subject to beatings with a nine-pound strap with five metal prongs attached, that he had been stripped to his waist and forced to work all day long without a rest period, and that he had been forced to serve as a "gal-boy" for the homosexuals among the prisoners. Douglas protested:

The Court allows him to be returned to Alabama on the theory that he can apply to the Alabama courts for relief from the torture inflicted on him. That answer would suffice in the ordinary case. For a prisoner caught in the mesh of Alabama law normally would need to rely on Alabama law to extricate him. But if the allegations of the petition are true, this Negro must suffer torture and mutilation or risk death itself to get relief in Alabama....

I am confident that enlightened Alabama judges would make short shrift of sadistic prison guards. But I rebel at the thought that any human being, Negro or white, should be forced to run a gamut of blood and terror in order to get his constitutional rights.

*Sweeney*, 344 U.S. at 92.

<sup>89</sup> *Id.* at 89-90.

<sup>90</sup> 482 U.S. 400 (1987).

confinement in the sentencing state could serve as a basis to refuse extradition by the asylum state. Under *California*, the Supreme Court held that only limited conditions could justify an asylum state in its refusal to extradite a prisoner: (a) The extradition documents facially are not in order; (b) the person has not been charged with a crime in the requesting state; (c) the person is not the person named in the extradition documents; and (d) the person is not a fugitive.<sup>91</sup>

Like an echo bouncing off the unforgiving wall of earlier chain gang fugitive cases, a 1996 case relied upon *California v. Superior Court* to deny asylum to an African American man who faced extradition from Michigan to Alabama. In *Alabama v. Engler*,<sup>92</sup> the Governor of Alabama sought the extradition of a fugitive who had been living in Michigan under a gubernatorial grant of asylum for fourteen years. Relying upon *California v. Superior Court* and the Full Faith and Credit Clause of the Constitution, the Sixth Circuit ordered his return. In his reluctant concurrence, however, Justice Nathaniel Jones expressed his reservations:

It is no secret that justice in the state of Alabama, particularly for the African-American, has been invisible or peculiar for all too much of that state's history....Today, Chance will not be faced with lynch mobs or counterfeit retrials. He will, however, be tossed into a prison system that has adopted the barbaric 'discipline' of the chain gang. This perpetuation

of injustice cloaked in the tattered cloth of the Alabama justice system is deplorable... In this current climate, reminiscent of the 'Old South,' which to some extent has been exported to other parts of the country, already difficult decisions are made more so for sensitive state officials to render prisoners, particularly African-American prisoners, back to jurisdictions like Alabama, which appear determined to resurrect harsh and inhumane treatment.<sup>93</sup>

However, this was a concurrence, and the court did send Johnson back.

The results of contemporary chain gang challenges were mixed, to say the least. The challenge to the Alabama chain gang was settled with the less than satisfactory result of an agreement to stop chaining the inmates together. Nevertheless, chain gangs remained in Alabama with inmates chained individually.<sup>94</sup> It was not a victory that left a lot of room for rejoicing.

In another recent case, an Iowa inmate had challenged, under the Eighth and Fourteenth Amendments, the placement of inmates from administrative segregation on the chain gang. His complaint was summarily dismissed for failing to state a claim.<sup>95</sup>

The last glimmer of hope flickered in

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<sup>93</sup> *Alabama*, 85 F.3d at 1210 (citations omitted).

<sup>94</sup> See *supra* notes 4 and 23.

<sup>95</sup> See *Chambers v. Chandler-Halford*, 124 F.3d 207 (8th Cir. 1997) (unpublished decision). The inmate's complaint in *Chambers* was dismissed under the Prison Litigation Reform Act, Section 1915A, discussed *infra* at notes 105-11.

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<sup>91</sup> *Id.* at 408.

<sup>92</sup> 85 F.3d 1205 (6th Cir. 1996).

an action filed in Nevada in which the Ninth Circuit held that the district court acted too quickly in dismissing a chain gang challenge brought by an inmate who was being held in a facility for misdemeanants and pre-trial detainees. The district court had dismissed the case as moot because the plaintiff had been transferred to a different facility. However, the Ninth Circuit reversed and remanded holding that the court should not have dismissed the case before deciding the motion for class certification.<sup>96</sup> Hardly a positive decision has been decided on the merits yet.

Julie left the library as it closed, her shoulders tense from hunching over the unyielding reporters, her eyes and head all a blur. She fell exhausted into her bed and tried to sleep. Deep sleep was long in coming and when it finally did draw her in, it would not refresh her.

The dream fell upon her like a net that she couldn't escape, although she tossed and turned as hard as any doomed fish. Her dream was a processional of caricatured misery. It was like a Mardi Gras for the condemned and she was lost in the swell of the crowd that watched, cheering it on.

The parade was led by a cartoon character, a black man, half clown, half minstrel, wearing a uniform with black and white stripes. He wore a ball and chain at his ankles that bounced a long merrily next to him. He had a hoe that he raised high toward the bright, cloudless sky, like a baton, as he tried to keep the rest of the followers in step behind him. She heard a little girl next to her exclaim brightly to her mother, "Look Mommy!! I just love the old cartoons, don't you?" Behind the parade marshal was Johnson Blue who was tethered to a long strand of

black men and boys, some of them mere children. As this first grouping dragged slowly by, the crowd cheered. "Look, look," cried a woman in front of Julie, "It's the chain gang! I've heard so much about them, I just had to see it for myself."<sup>97</sup> An elderly white lady next to Julie whispered in Julie's ear, "I love seeing 'em in chains. They ought to make them pick cotton all day."<sup>98</sup> And, as if on cue, behind the chain gang came a band of men and women dragging heavy cotton sacks. Men in white marched with hoes moving up and down to an invisible band's glorious march. Again, the crowd roared with approval. At her other side, a white man dressed in the dandiest suit, slapped Julie on the shoulder and loudly proclaimed, "You know slavery was good for blacks."<sup>99</sup>

The groupings followed, one after another, like different high school bands playing variations on the same theme. Rolling auction blocks with nearly naked men shackled at the feet. Then came a tap-dancing butler next to mammy who fanned a fainting Scarlett.<sup>100</sup> Majorettes carried a banner that

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<sup>97</sup> When interviewed, Sheila Bolt, a homemaker from Birmingham, and tourist on one of the many tour buses that visit the Limestone Correctional facility to see the chain gangs, said, "I've heard so much about them, I just had to see it for myself." Parsons, *supra* note 40, at 10.

<sup>98</sup> John Leland, *Back on the Chain Gang*, NEWSWEEK, May 15, 1995, at 58 (quoting Flossie Hodges, a longtime resident of Limestone County Georgia, who was watching the chain gang work on an Alabama roadside).

<sup>99</sup> *Alabama*, 85 F.3d at 1210 ("Equally offensive is the position recently espoused by an Alabama State Senator, riding what he obviously believes to be a popular political current, declaring slavery 'good for blacks.'").

<sup>100</sup> The testimony of the Director of the Arkansas Department of Corrections in support of the prison farming operation in the *Sarver* case actually

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<sup>96</sup> *Wade v. Kirkland*, 118 F.3d 667 (9th Cir. 1997).

said, "Our Proud Movie Heritage." One group marched by that garnered everyone's disapproval. A troop of black men, fists held high in a black power salute, afros as big as Jimmy Hendricks'. They defiantly stepped out of time to the steady beat of the band. Their angry voices shouted resistance. The crowd shrieked and booed. Behind her, Julie heard people murmur, "What's wrong with these people? What is it that they want?" and "They'll get nowhere that way, very counterproductive indeed." Julie trembled, unsure whether to applaud the rebellious or run from the whole scene. A sigh of relief passed over the crowd as the black power group passed out of sight, followed by a train made up of cars with black men in cages,

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referenced "Gone With the Wind" as authority for the intent of the drafters of the Thirteenth Amendment:

According to Director Bennett, the idea that prisons and prisoners ought to support themselves is as old as American penology. He referred to the fact that the convict-leasing system came into existence at a very early stage as the States found that it was more profitable to lease their convicts than to work them themselves. And he pointed out that one of the best descriptions of the leasing system is to be found in Margaret Mitchell's Civil War novel, 'Gone With the Wind.'

When Congress submitted the Thirteenth Amendment to the States, it must have been aware of generally accepted convict labor policies and practices, and the Court is persuaded that the Amendment's exception manifested a Congressional intent not to reach such policies and practices.

Holt v. Sarver, 309 F. Supp. 362, 372 (E.D. Ark. 1970).

holding on to the bars. The train seemed endless. It trailed as far down the parade route as Julie could see.<sup>101</sup> A few of the cages held women who lifted their babies for the crowd to see in the vain hope for mercy.<sup>102</sup> She heard the crowd roar in response, "You do the crime, you do the time!!!"

Julie woke up exhausted. Images from the dream reoccurred to her throughout the morning like an annoying jingle that won't stop replaying itself. She went to work that

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<sup>101</sup> Nearly one-third of young African-American men between the ages of 20 and 29 are in prison, jail, or on probation or parole. See Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 201 (1998) (hereinafter Meares). In 1993, African-Americans represented 49.7% of the state prison population and 33.7% of the federal population, while whites represented 45.6% and 63.1% respectively. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994 at 546 (Kathleen Maguire & Ann L. Pastore eds., 1994).

<sup>102</sup> "Between 1980 and 1994, the number of women entering the nation's state and federal prisons increased by 386 percent compared to a 214 percent increase in the number of men entering prison." IRWIN AND AUSTIN, *supra* note 42, at 162-63. Of all ethnic groups, African-American women experienced the greatest increase in criminal justice supervision, largely as the result of the War on Drugs legislation. *Id.* African-American women constitute half of the female prison population. Much of the recent growth of incarceration of African-American women has been attributed to the burgeoning prison population serving sentences for drug offenses. The number of African-American (non-Hispanic) women incarcerated in state prisons for drug offenses multiplied more than eightfold from 1986 to 1991. MARC MAUER AND TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 1-2, 13 (The Sentencing Project, Oct. 1995). The effect that this mass imprisonment has had upon the black family has been great. See Meares, *supra* note 101, at 201. Nearly 80 percent of women in prison are mothers, a majority of whom are single. IRWIN AND AUSTIN, *supra* note 42, at 163.

day dragging and vowed to take a break from the chain gang case. Maybe she needed a little time to gain the necessary insight.

She had come to think of her cases like a rockhound thinks of her collection. Some cases were dull solid little lumps that were easy enough, reassuring even. They were the simple wills or the rear-ender accident cases. Yes, the client had been struck from behind. Yes, she had documented injuries and damage to the car. No, she was not permanently hurt in any way, and, much to the client's relief, Julie could get her a free rental while her car was being repaired. The case was smooth and easy. A couple of negotiation calls, a couple of client meetings, and everyone was happy. It was a nice stone with no rough edges. She could keep those in her pocket and feel them whenever she became anxious, like today.

Then there were the ugly jagged pieces of gravel that she wondered how she had let slip in to her collection. Mostly, they had been cast off by someone somewhere above her in the firm. She approached her work on these cases with dread, torn between wanting to let them sit on her desk forever and wanting to hurry up and be done with them. These were the cases she didn't believe in, the domestic relation cases where her client was the jerk, the motions for reconsideration after the case had already been soundly and justly lost.

And then, there were the gems in the rough. The mottled rocks that take a lot of force to crack open but internally have the potential to shine. The cases that, as she polished and cut, more facets appeared, more issues, more challenges. The light that shot through them was her client's hope mixed with her own curiosity and zeal. Often these were hard cases, sometimes they seemed impossible, but the struggle would polish them bright so that in the end some complicated clarity might emerge that she

could then simplify and convey to a judge or jury and, hopefully, prevail. She had hoped that this case was just such a gem. But now she wasn't so sure. The more she looked at it, the more issues she found, sure enough. But the cuts were so complicated and the stone so dense that she wondered if it would ever reveal its brilliance. In the end, she was not sure what she would have, a useless bauble to lie on the trophy shelf of her intellect or a gift for Johnson Blue.

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For about a week, Julie let Johnson's file sit unopened on her credenza. She didn't even want it on her desk. She felt better having it behind rather than before her awaiting her attention. And then one day she got a letter. The handwriting on the envelope was precise. And the letter inside was written on wide rule loose leaf paper. She knew immediately who had sent it.

Dear lawyer,

I decided on calling you lawyer, it seemed better than ma'am. Smile. I was just riting to let you no that I am still on the chain gang. I was also onedering about what you think my chances of winning are if you rite my papers like we talked. Some of the other inmates here say there's no way. They think we are gon to lose, but I tell 'em I have a lawyer now who is pretty smart. So what do you think? By the way, I want to thank you again for comin' down to see me. I also want to thank you for not asking me about why I am here. I no you wer wandering. Thank you for sticking to bizness.

Sincerely,

Johnson Blue, Inmate # 777

Johnson wanted to make sure she

didn't forget about him. There'd be no out of sight out of mind now that they'd gotten started. So what if he didn't tell the other inmates that she was pretty smart? They *had* told him more than once that he was going to lose, and he did bark back at them to shut the hell up.

After she left, Johnson replayed their conversation more than a few times, and he had come to realize that she didn't seem the least bit interested in what he had done to wind up in prison, and that did seem really decent, especially since that mess all happened so long ago it was like another life to him. He had been so stupid; he was almost free of his parole officer when he allowed himself to be sucked into a series of events that resulted in this last long sentence. He had been partying at a house with his friend—smoking and drinking—when someone borrowed his car and did not bring it back to the house. As the morning dawned on the party, a friend offered him a ride home. On the way home, angry and high, he was all too willing to agree that stealing a car would solve his current transportation problem. It was a Sunday morning and the best selection of cars could be found at the church parking lot. Their first mistake was to steal a car from a white church lot. Their second mistake was to take the nicest car there. So there he was, driving around in a small town high as a kite in the bank president's car stolen from a church lot while he was on parole.<sup>103</sup> He was

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<sup>103</sup> The largest percent of those incarcerated in America's state prisons are there for nonviolent crimes. Violent offenders make up only 27.1 percent. Property, drug and public order offenses comprise the remainder. Of those in prison, 67.4% are serving sentences for new crimes, 15.6% are incarcerated for technical parole violations, and 13.1% are committed for new crimes occurring during parole. IRWIN AND

embarrassed to recount this misadventure to anyone.

In an odd and unexpected way, he found himself wishing Julie would visit again. It was true that no one had been to see him for quite a while, and so just having company was a nice change. But still, this girl who had annoyed him so with her *we* and her *us* while she was there made him think and remember things he had long ago stopped thinking about.

He had to decide who he was going to be with her. The con, the humble old black man, the Romeo or someone more like who he really was, that someone that had been lost to mostly everyone including himself somewhere in the long drought of any social interaction. He could play the con and sweet talk her into doing things for him. He sensed that there was something vulnerable about her, something needy. He felt sure that, if he wanted to, he could woo her into being his instrument. But instrument for what? He had long ago taken himself out of the prison bartering system. The trades went on around him, but now they seemed to not matter much to him. He really needed nothing from the outside.

Yes, the thought did occur to him that she was a woman, and that he hadn't been close to a woman for a long time. But she was a white woman and young. And what did he need with that kind of trouble? His mama had taught him well on that score. He shook his head and laughed at himself as he thought about the craziness of worrying about ending up swinging from some tree when he was already in prison on a twenty-five year sentence.

He could play the humble old black

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AUSTIN, *supra* note 42, at 23-24.



man, but that just made him angry, and she seemed to be wise already to that masquerade. She was white, and that did present a different set of challenges for him. Not only that, she was white in a different way than what he was used to. She didn't want the humble old black man; unlike most other whites he knew who slipped happily into that exchange, she was uncomfortable with it. His mama would say *watch out for the ones that means well. They can do you the most harm.* He wanted to trust her, and he was curious about what made her want to be so different, but lord knows what she might bumble the two of them in to with all of her good intentions.

But then he needed someone with good intentions for this job. If he was really going to try to stop the chain gangs, he needed someone who believed it was possible, and who wanted to try, and so after he thought himself all into knots about her— was she temptress or fool?— he decided he needed her precisely for what she had come to do and no more— to be his lawyer. If along the way she became something else, then he would see what that something else was when they got there. But he would not try to direct it. It would be challenge enough for him to get accustomed to having a white woman lawyer.

Did he really think he was going to win? He thought about that as he told the others to shut their mouths and as he wrote the letter to her. He didn't really know. The law makes promises, and for him the promises had always been against him. The law said, *If you do this, we will lock you up. If you do that, particularly to a white person, you will not live with your family for most of the rest of your life.* And for the most part, the law had kept its promises. He found it hard to believe that the law would be as dutiful about keeping the promises that were made for him. But he felt that at this stage of his life, he had to

know; he had to try.

He'd felt these chains before, not as real metal clamped hard around his ankles, but nonetheless their dragging weight was no stranger to him. He remembered that weight settling down atop of him after his real daddy died.

His real daddy was a quiet man; yet he had sheltered his children from the harshness of the world outside of the home they rented from Mr. Biller. He worked hard so that they wouldn't have to. He worked in the fields alongside their mama everyday, except Sunday. Sunday they all went off to church, then home for dinner, and then his mother and the children went back again for the evening prayer service.

Their daddy would go to Sunday school, and he would go to the first service, but there was only so much churching he thought a grown man needed and so he let his wife take the children by herself for the evening so he could have his peaceful time. Most of the time, he would be asleep by the time they got back, and so it was not a remarkable thing that he was sitting still in his chair under the chinaberry tree when they returned from prayer meeting that sad evening. When Johnson gently shook his daddy's shoulders to get him to go into the house, he slumped forward, nearly falling out of the chair, and that's when Johnson knew that something was wrong. He hollered for his mother who came running and she shook him too, shook him until she screamed with grief. By then, all the children had gathered round and the neighbors too.

Robert was just a baby when his daddy died, and Johnson and his sisters took care of him as best they could. His mama was sick with grief and wouldn't even nurse the baby. They put a little sugar in goat's milk and hoped that Robert would take it, just like the

midwife said. It worked, and Robert grew despite his mother's lack of attention.

Johnson's world became harder the day they laid his daddy in the ground near the church. He became the little man of the house, provider, protector and daddy to Robert. He had to venture to the store, to town and to account with Mr. Biller. He had to learn to pretend humility to get along in the white world, and that outward humility made him angry on the inside. He had to learn self sacrifice working with his mother when he should have been in school. He had to learn to act ignorant even when he knew that the world was cheating him. The cuffs locked tight around his ankles. He found some shelter at the church on Sunday, but the world outside had become a mean place.

Later, and for a reason that Johnson still could not understand, his mother took up with a man who, as far as Johnson could tell, needed lots of churching, but never had none of it. His mother announced, "Be good to your new daddy. Not every man would take on a family with so many children."

And it was from that day forward, Johnson felt like an outsider in his own family. They would sit at the table in tense silence while that man would bark, "Pass the peas ugly." And too afraid to do much else, they would pass the peas. It was hard to tell who the man hated the most, himself, his wife, or his new children. It was like he had taken all of the meanness of the outside world and swallowed it whole, then digested it so thoroughly that it had become him. He would insult his wife's cooking and call her children stupid. He made them into little slaves and thought himself above work. Johnson watched his mother's will, already weakened by the death of her husband, whither under this monster's meanness. She turned over to him the power of the switch, and he used it

randomly and fiercely, not just against the children but against her too. Johnson would hide Robert out in the shed when he got that way. The two of them would sit there together, and Johnson would tell Robert over and over again, "This ain't your daddy. Your daddy was a good man. Don't you never think of this man as your daddy."

They stopped going to church. They stopped seeing their other family and friends. They even stopped going to school because the harvest was slower with no man and a weakened mother in the fields. They lived like this for seven years. The chains were locked and the key, thrown away. The meanness of the world had vanquished; it had entered their house in the confusing presence of a man that was supposed to love them.

During the seventh year, when Johnson was fifteen, he stopped running to the shed. He ordered Robert to go alone. During that seventh year, Johnson stayed in the house with his mother and sisters. He shouted curses at his mother's husband.

Once, when his stepfather had his mother pinned to the floor, his fist raised above her head, Johnson ran and got the hunting rifle. Johnson held it on the man and threatened to blow his sorry head off of his worthless shoulders. The man backed down that evening, but it was a momentary truce. From then on, Johnson and his step-daddy waged war in the house, with his mother and sisters captive spectators.

Johnson did not know what was going on in the mind of his mother at the time, but during that seventh year watching her son fight for her, maybe seeing her first husband in his eyes and fearing for his safety, she made plans, secret plans, and she got her will back, all alone, she got her will back. She made arrangements with Mr. Biller, and in the middle of the night, while her husband slept,

she woke Johnson, Robert and their sisters. She pulled sacks out from under their beds and like a slow parade of sleepwalkers, they marched through the fields under moonlight from their house to another almost exactly like it way over on the other side of the farm. They carried their sacks with as many of their possessions as they could handle. Johnson walked behind his mother. He still could remember her silhouette in the moonlight, carrying the pots and pans that she had muffled with her own clothing in a cotton sack slung over her back.

He found them, of course. He demanded that they let him in. She refused. Then he changed his tune, brought flowers from the meadow. And still she refused. Johnson was never so proud of his mother as when he saw her throw the flowers at his feet. In that moment with the daisies all akimbo in the dirt, Johnson almost forgave her for inviting this man into their lives in the first place. That night, her husband returned with his rage to fuel him. He broke the door off its hinges and let the full force of his anger be felt upon Johnson's mother. Johnson ran for the kitchen knife, jumped the man and stabbed him deep and hard in the back. He staggered to the floor in a heavy fall. He didn't die, but he never came back. The attack may have ended one unhappy period, but it gave birth to another. It was Johnson's first offense, and although he was a juvenile, and although his lawyer was surprisingly frank in Johnson's defense stating that Johnson had merely hurt a worthless man who the world would not miss even if he were dead, Johnson was convicted of assault and the judge sentenced him to spend the rest of his minority in the boys' reformatory.

Johnson was not sorry. He would never be sorry for putting his family out of its misery. But he had come to know early on,

the weight of a world that had been spoiled for him long before he was born. His real daddy had protected him as long as he could, and if he hadn't died maybe Johnson wouldn't be locked away today, but Johnson would have met up with the evil of those chains one day. He would have had to figure out how to be a man in a world where humility and ignorance were demanded of him. Even if he did manage to succeed in life, he would have to hide it. *Save your Sunday best for Sunday; don't drive too fast or fancy.* These were the unwritten rules by which the few *successful* black men in his community lived. You can't afford to forget your place.

He had been on a chain gang for a long time, linked to others just as angry and tired as he was. Maybe with this one small act of resistance, he could learn to be the kind of man his real daddy would have been proud to know.

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As Julie read the letter, she felt sickening guilt envelope her, but she knew the way to cure it. She needed to work on the case again. She would leave the history behind and focus on procedure and what could be done now.

She obviously first had to avoid dismissal. Right now, Blue faced a motion to dismiss for a failure to state a claim because he had relied solely upon the Thirteenth Amendment. The motion was not just based upon Rule 12(b)(6),<sup>104</sup> but also some new law, the Prison Litigation Reform Act ("PLRA"),<sup>105</sup> was cited to buttress the rather

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<sup>104</sup> Rule 12(b)(6) of the of Federal Rules of Civil Procedure provides for the dismissal of a case for the failure to state a claim upon which relief could be granted.

<sup>105</sup> The Prison Litigation Reform Act of 1995 (hereinafter "PLRA") was passed as Title VIII of the

routine motion. In the PLRA, Julie discovered a statute that seemed designed to thwart prison litigation at every turn. Signed into law in 1996, the PLRA reached out into every aspect of prison litigation, from the granting of in forma pauperis status<sup>106</sup> to the

amount of attorneys' fees that could be awarded in successful cases.<sup>107</sup> It even allowed for cases that had been won by inmates to be dismissed if prospective relief had been awarded which was not narrowly tailored to meet the violation.<sup>108</sup> And money

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Omnibus Budget Reconciliation Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). It served to amend several sections of 18 U.S.C., 28 U.S.C. and 42 U.S.C..

<sup>106</sup> Prior to the PLRA, 28 U.S.C. § 1915(a) (1994) authorized courts to waive the payment of the initial filing fees and permit an inmate to proceed in forma pauperis upon submission of an affidavit that he was "unable to pay such costs or give security therefor." However, the PLRA amended this provision in several significant ways. Now, a prisoner who wishes to initiate a court proceeding must submit a statement of all of his assets as well as a certified copy of his prison trust account for the six month period immediately preceding the filing of his complaint. 28 U.S.C. § 1915(a)(1)-(2) (1996). Even if he or she qualifies for in forma pauperis status, the inmate must pay an initial partial filing fee computed on the basis of the prisoner's account. 28 U.S.C. § 1915(b)(1). He or she is then required to pay the balance in monthly installments. 28 U.S.C. § 1915(b)(2)-(3). Finally, if a prisoner has filed, while incarcerated, three or more cases that have been dismissed as frivolous, malicious or failing to state a claim, that prisoner may not proceed in forma pauperis at all, unless he can show that he is "under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Subsection (g) has withstood constitutional challenge. Most of these challenges have relied upon the Equal Protection Clause and substantive due process principles. *Wilson v. Yaklich*, 1998 WL 292248 (6th Cir. June 8, 1998) (finding that neither the Equal Protection Clause nor substantive due process principles were violated by the statute's differing treatment of indigent inmates compared to non-indigent inmates or freeworld indigent plaintiffs); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997), *cert. denied*, \_\_\_ U.S. \_\_\_, 117 S.Ct. 1711 (1997) (rejecting claims that section 1915(g) blocked access to the courts); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996) (holding that section 1915(g) was not impermissibly retroactive).

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<sup>107</sup> Under 42 U.S.C. § 1997e(d)(3) (West Supp. 1998), the amount of attorney's fees in any action brought by a prisoner who is confined to any jail, prison, or other correctional facility in which attorney's fees are authorized under 42 U.S.C. § 1988 of the Civil Rights Act, shall be based on an hourly rate no greater than 150% of the hourly rate established under 18 U.S.C. § 3006A for payment of court-appointed counsel. This rigid standard departs from the usual fee determination in civil rights cases in which the hourly rate is determined by a number of factors, including the community's market rate for the services rendered. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989). Typically, the rate for court-appointed counsel is significantly lower than the hourly rate charged by all but the most inexperienced attorneys. For example, the current hourly rate set for court-appointed counsel is \$75.00. 18 U.S.C. § 3006A (1994).

<sup>108</sup> See 18 U.S.C.A. § 3626(b)(1)-(2) (West 1998). The constitutionality of this provision has been much questioned by scholars as a violation of the doctrine of separation of powers. See Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WISC. L. REV. 1275 (1997). Most constitutional challenges to this provision have been unsuccessful. *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998); *Dougan v. Singletary*, 129 F.3d 1424 (11th Cir. 1997); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081 (8th Cir. 1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996), *cert. denied*, 520 U.S. 1277 (1997). Only the Ninth Circuit has held that the PLRA's provision authorizing immediate termination of prospective relief in prison conditions suits absent a finding that such relief is narrowly drawn and the least intrusive means of correcting the violation of the federal right violates the separation of powers doctrine by reopening final judgments. *Taylor v. United States*, 143 F.3d 1178 (9th Cir.), *withdrawn, reh'g granted*, 158 F.3d 1059 (9th Cir. 1998).

damages were curtailed so that prisoners could not be awarded compensatory relief for emotional distress caused by the violation of a right without the finding of a physical injury.<sup>109</sup> Julie was suddenly glad that Johnson Blue's complaint had not requested damages for being on the chain gang.<sup>110</sup>

For her present purposes, she saw that the motion cited 28 U.S.C.A. § 1915A<sup>111</sup>

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<sup>109</sup> See 42 U.S.C. § 1997e (Supp. 1997). This provision has been critiqued in Susan Heather O'Bryan, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement On the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189 (1997).

<sup>110</sup> For cases that have denied compensatory damages relief for constitutional rights violations under the PLRA, see *Siglar v. Hightower*, 112 F.3d 191 (5th Cir. 1997); *Luong v. Hatt*, 979 F. Supp. 481 (N.D. Tex. 1997). *But see Ellis v. Illinois*, 1997 WL 51502 (N.D. Ill. 1997).

<sup>111</sup> 28 U.S.C. § 1915A (West Supp. 1998) provides:

(a) Screening.-- The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.-- On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition.-- As used in this

which seemed to impose upon the court a positive duty to review sua sponte all prisoner complaints before docketing, if possible, and as soon as possible if not. The court was instructed to dismiss all claims that were frivolous, malicious or failed to state a claim. The attorney general cited it here to highlight the court's responsibility to clear the decks of any nuisance suits, like this one.

Ah, well, at least the judge had not dismissed this case outright, an end which would have been justified given the stated basis for Blue's claim<sup>112</sup> and was apparently statutorily encouraged. In fact, this court decided to appoint counsel, a decidedly hopeful sign given the rather dismal landscape of contemporary prison litigation, and so Julie set about doing what she knew the court expected of her; she began drafting the amended complaint.

Even though federal rules generally expected little more than notice pleading, she felt that given both the substance of her claim and the demands of the PLRA, a somewhat more fleshed out complaint was in order, one that would precisely state her theory with sufficiently detailed facts to support it. It was not enough to say that the chain gang violated the Eighth Amendment. It was not enough to say that chain gangs were cruel and unusual punishment; she had to say how.

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section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

<sup>112</sup> A multitude of cases challenging prison work requirements under the Thirteenth Amendment have been decided and dismissed. *See supra* note 108.

She read many of the landmark cases on the Eighth Amendment, from *Weems v. United States*<sup>113</sup> with its classic statement that the Eighth Amendment is “progressive and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice”<sup>114</sup> and *Trop v. Dulles*<sup>115</sup> with its “evolving standards of decency that mark the progress of a maturing society.”<sup>116</sup> She read *Estelle v. Gamble*<sup>117</sup> and the more recent *Wilson v. Seiter*<sup>118</sup> with their imposition of the “deliberate indifference” requirement in all prison conditions cases.<sup>119</sup> She read the death penalty cases, both those against it<sup>120</sup> and those allowing it.<sup>121</sup> She studied the most recent prison cases, like *Hudson v. McMillian*,<sup>122</sup> *Helling v. McKinney*,<sup>123</sup> and *Farmer v. Brennan*.<sup>124</sup>

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<sup>113</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>114</sup> *Id.* at 378 (citations omitted).

<sup>115</sup> *Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>116</sup> *Id.* at 101.

<sup>117</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>118</sup> *Wilson v. Seiter*, 501 U.S. 294 (1991) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)) (the plaintiff in the prison conditions case must show that the prison officials acted with deliberate indifference with regard to fostering a deprivation denying “the minimal civilized measure of life’s necessities”).

<sup>119</sup> *See supra* note 118.

<sup>120</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>121</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976) (not cruel and unusual punishment to impose death penalty upon individual convicted of armed robbery and murder).

<sup>122</sup> *Hudson v. McMillian*, 503 U.S. 1, 1 (1992) (to determine whether the prison official’s use of force inflicted upon a prisoner constitutes cruel and unusual punishment, the court must look to whether the “force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm.”).

<sup>123</sup> *Helling v. McKinney*, 509 U.S. 25 (1993) (health risk posed by involuntary exposure to environmental tobacco smoke can form the basis of an Eighth Amendment violation if the prisoners show that the

She tried to break the cases down into neat categories-- conditions of confinement,<sup>125</sup> excessive force<sup>126</sup> and challenges to the cruelty of the sentence itself.<sup>127</sup> It was not always a neat paradigm; sometimes they overlapped, but most of the cases fell primarily into one or the other of the categories. Johnson Blue had not been sentenced to the chain gang;<sup>128</sup> he

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prison officials acted with deliberate indifference).

<sup>124</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994) (Eighth Amendment claim remanded to determine if prison officials acted with deliberate indifference when transsexual inmate who projected feminine characteristics was placed in general male population and then beaten and raped by another inmate).

<sup>125</sup> *Wilson* represents the most significant recent advance in conditions of confinement cases in that it incorporates the “deliberate indifference” requirement from *Estelle v. Gamble* to cases challenging the general conditions of confinement. Now, a plaintiff must prove both an objective and subjective prong in conditions cases. The objective prong requires that the conditions of confinement be so serious that they result in the deprivation of a basic human need. The subjective prong requires that the plaintiff prove that the conditions were the product of the defendant’s deliberate indifference to the prisoners’ basic human needs. *Wilson v. Seiter*, 501 U.S. 294, 269-99 (1991).

<sup>126</sup> *Hudson* is the most recent case dealing with when the use of excessive force constitutes cruel and unusual punishment. *Hudson v. McMillian*, 503 U.S. 1 (1992).

<sup>127</sup> The death penalty cases are the most obvious cases in recent times to deal with the issue of whether the penalty imposed by the sentence is cruel and unusual. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (not cruel and unusual punishment to impose death penalty upon individual convicted of armed robbery and murder); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (cruel and unusual punishment to impose death penalty as punishment for rape of adult woman).

<sup>128</sup> Some states do have statutes that allow explicitly for the sentencing of those convicted of certain crimes to the chain gang. Others use the chain gang as discipline for inmate infractions of prison rules. Still others simply treat it as any other work detail and assign those whom the administration chooses based upon security risk or other internal criteria.

was just placed there as part of the way the prison was administered. Therefore, Blue's was a "conditions of confinement" case, which would mean that Julie would have to allege that the prison officials acted with deliberate indifference and that the conditions imposed upon him resulted in "a deprivation of the minimal civilized measures of life's necessities."<sup>129</sup>

Further research into the circuits turned up a line of cases holding that even though the state could compel prisoners to work for little or no compensation, the Eighth Amendment could be violated if "prison officials knowingly compel[led] convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health or which is unduly painful."<sup>130</sup> These cases sounded promising at first; at least there was a crack in the armor that surrounded the state's right to compel inmates

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<sup>129</sup> *Wilson*, 501 U.S. at 304.

<sup>130</sup> *Ray v. Mabry*, 556 F.2d 881, 882 (8th Cir. 1977). See also *Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990) (prisoners stated an Eighth Amendment claim when they alleged that they were disciplined for refusing to assist prison maintenance supervisor in cleaning out wet-well portion of prison's raw sewage lift-pump station without protective clothing and equipment); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989) (prisoner stated an Eighth Amendment claim when he alleged that he was compelled to do work that was inappropriate to his medical condition); *East v. Lemons*, 768 F.2d 1000 (8th Cir. 1985) (prisoner's civil rights claim alleging that he was placed in punitive isolation after complaining about muscle cramps suffered on the first day of vigorous labor after having a period of sedentary confinement stated a claim cognizable under the Eighth and Fourteenth Amendments); *Black v. Ciccone*, 324 F. Supp. 129, 133 (W.D. Mo. 1970) (prisoner wins habeas corpus petition on grounds that his work assignment in the barber shop constituted cruel and unusual punishment as prison officials knew of his hip ailment and did not reassign him).

to work. However, the type of well-being that the court was concerned about here was the prisoners' *physical* well-being. These cases were mostly concerned with the health of the particular inmate and the rigors of the job to determine whether the demand upon him would be too great.<sup>131</sup> There was no Cinderella fit here.

Among the prison labor cases that she read, *Fruit v. Norris* seemed the most promising. It involved inmates who simply refused to do the degrading and dangerous job of lowering themselves into a deep and narrow sewage pit into which all of the waste of the of the prison eventually passed. To make things worse, waste would have continued to be flushed into the well as they worked and the temperature in the pit during this particularly hot July day was 125 degrees. The court found that "forcing inmates to work in a shower of human excrement without protective clothing and equipment would be 'inconsistent with any standard of decency.'"<sup>132</sup> Even though the prison officials testified that they believed that this work was safe and that no one had been hurt or become ill in the past, the court found that common sense should have told them otherwise and "deliberate indifference" could therefore be inferred.<sup>133</sup>

Julie looked further to see whether *Fruit* had been relied upon and extended in any way to reach psychological harm. What she found was just the opposite. While never having been overruled, courts were reluctant, even the Eighth Circuit that decided it, to apply *Fruit* to future cases with very similar

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<sup>131</sup> See *supra* note 130.

<sup>132</sup> *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) (citations omitted).

<sup>133</sup> *Id.* at 1150.

facts.<sup>134</sup>

Julie knew it was weak but she believed that *Fruit* was analagous to her case on any number of grounds. *Fruit* involved work that was clearly physically dangerous even though no harm had yet befallen anyone; in her case Johnson had not been injured, although others in other chain gangs had.<sup>135</sup> Julie felt that she could support this argument with the Supreme Court's recent decision in *Helling v. McKinney* in which the Court found that an Eighth Amendment claim could be based upon possible future harm to health arising out of the second-hand tobacco smoke.<sup>136</sup> Finally, both *Fruit* and her case had that same feeling of deliberate indifference to degradation in which the purpose of the work was to humiliate.

Julie felt that she could make a colorable argument that the prison officials were deliberately indifferent to the possible harm that they caused the inmates by unleashing the chain gang practice on them once again.<sup>137</sup> The less than illustrious history of the practice foreshadowed the dangers that had in fact already unfolded in some places. The sweat box had even been revived in Arizona and the hitching post in Alabama. People were indeed shot and yet the practice

continued.

As she made this argument, she was painfully aware of its weaknesses. Today's chain gangs were not as dangerous as those in the past. While obviously degrading and difficult, the chains were lighter and the tortures not as obscene. She would be answered with a catalogue of prison regulations allegedly designed to meet the health and safety needs of the inmates committed to the chain gang. It was nothing if not an orderly oppression that Johnson Blue faced. Worse yet, yesterday's chain gangs with their magnified horrors were never held unconstitutional by any authority that had not been reversed, even though the Supreme Court had the opportunity to do so.

Beyond deliberate indifference, she also was faced with proving that the practice deprived Blue and others "of the minimal civilized measure of life's necessities."<sup>138</sup> Well, certainly if the court bought her potential for harm argument, she could argue that the chain gang had the potential of depriving Blue of his life and limb. Other incidents of the practice also might help to satisfy this prong. Julie made a note to ask her client how toileting needs were met on the chain gang. She had read that some chain gangs provided only metal cans that were passed to the inmate in need.<sup>139</sup>

*There*, Julie slid back from her library chair, *I've figure it out*, she thought. But she did not feel the same measure of satisfaction she normally did. These theories, with the potential for physical harm at their core, seemed neither solid nor did they capture the gravamen of the harm. In short, they didn't speak her client's truth. But could they? Did

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<sup>134</sup> The Eighth Circuit refused to extend the principles enunciated in *Fruit* in *Good v. Olk-Long*, 71 F.3d 314 (8th Cir. 1995). The Fourth Circuit distinguished *Fruit* from a case with very similar facts. *Rish v. Johnson*, 131 F.3d 1092 (4th Cir. 1997). Both cases involved working without protective clothing in arguably dangerous situations: *Olk-Long* involved orderlies required to clean blood and other body fluids from surfaces in cells and examining rooms; *Rish* involved cleaning human waste.

<sup>135</sup> See *supra* note 5.

<sup>136</sup> *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993).

<sup>137</sup> The argument for deliberate indifference is also made in *Peloso*, *supra* note 2.

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<sup>138</sup> *Wilson*, 501 U.S. at 304.

<sup>139</sup> See *supra* note 25.



any of these theories care about the psychological harm caused to an African-American man put in chains? Or to the society that watches them march by?

Julie returned to the optimistic and open language of *Weems* and *Trop*. The language that allowed for a broader inquiry into evolving standards of decency, that at least let her voice her client's real feelings. The truth was that he could be killed. But he could also be in danger and was in fact harmed doing work at the prison farm. That physical harm was not his concern. Stopping slavery, that was his concern; finding or maintaining some dignity even amidst punishment, that was the relief he sought.

*Weems* and *Trop* were not as clearly applicable as *Wilson* and *Fruit*, but she would not let them be ignored. After all, it may have been that *Weems* was a case about the disproportionality of a sentence, but the sentence involved sounded somewhat reminiscent of Blue's plight. In *Weems*, a civil servant was sentenced to wear a chain from his ankle to his wrist and perform hard labor for fifteen years as punishment simply for falsifying an entry in a public document.<sup>140</sup> Surely it was not just the length of the sentence but its conditions that seemed to shock the Court. The two were not that easily separated. If the Court could be shocked in 1910 over this punishment, could it not be shocked by chain gangs in the 1990's? And *Trop* looked to the psychic injury of losing one's citizenship in invalidating expatriation as a punishment for desertion.<sup>141</sup> If the Court could feel the emotional pain of losing one's citizenship in 1958, could it not today recognize the trauma that being placed in

shackles would hold?

Perhaps. Or perhaps it was just rhetoric, like so many other discussions or claims made for racial justice. Would the court care about the rhetoric of penology that metes out symbolic punishments injurious both to the inmate and the society that watches with that "I told you so" look in its eyes? What were the standards of decency and were they evolving or devolving?

She was no longer sure. The outlook was frankly quite bleak. Nevertheless, she included the *Weems-Trop* claim. She wrote about slavery, and she dared to write about the feelings of a prisoner.<sup>142</sup>

But what to write to him? Johnson Blue's letter sat pinned under the crystal paper weight on her desk; it called out for a response to his question— *what are my chances? What are my chances if we play the game the way you said? Will it be any different than if we had let the complaint sit there in my voice and handwriting?* Julie had learned a lot so far and had more to learn about the limits of the law and the limits of her own fear and her ability to overcome it. Racism was dug in, to her, to the law, to a society that watches the parade as it goes by and cheers. She decided that his were questions that could not be answered in a letter and so she decided to make another visit to share with him what she had learned.

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This meeting was not so awkward as the last. The handcuffs and leg chains came off and the defenses went down, and the two of them seemed to look at each other with new

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<sup>140</sup> *Weems*, 217 U.S. at 364.

<sup>141</sup> *Trop*, 356 U.S. at 99-103.

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<sup>142</sup> Section 803(d) of the PLRA amends the "Civil Rights of Institutionalized Persons Act" to prohibit the bringing of any action by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e (1997).

eyes free of distrust and ready to hear a different kind of truth.

"I got your letter," she began simply.

"It's nice to see you," he replied.

"I've done a lot of reading since the last time we met."

"And what do you think now?"

"I used to think that the law was your friend."

He couldn't help it, but he laughed, "Lord, Lord, why would you think that? It never got me any place but here before."

"I guess I never saw it that way; I always thought that being a civil rights lawyer meant I would help to make things right. In the words of that old song, *I was blind, but now I see*. I'm sorry. What do you want to do?"

"No, no you can't get off the hook that easy. You're the lawyer. You're supposed to be so smart? What are my chances?"

"There's a chance. There's always a chance. I brought along a copy of the amended complaint. There is something to

say here. It's just that there's a lot of forces against you too."

"Is that what you drove down here all sad-faced to tell me? Tell me something I don't already know. If I cared that *forces are against me*, then I wouldn't have filed the paper to begin with. Let me tell you a secret," he bent over the table close and his breath felt warm in her ear. "I have three choices here. I stay quiet and take my poison; I use my swing blade like some kind of weapon and get myself killed; or I take my chances with you." He settled back into his chair, "What do *you* think I want to do?"

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Their meeting had been brief; their words, few. They began to work together at yet another different level and they both knew that there were more levels to peel back and discover. The goals were changing and yet the same. It had always been about justice and manhood. It had always been about fear and trust. It had been about the small steps that one can take while still wearing chains.